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# United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

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**SOUTHERN OREGON COMPANY**  
APPELLANT

VS.

**THE UNITED STATES OF AMERICA**  
APPELLEE

---

## TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United  
States for the District of Oregon

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Filed

MAR 3 1915

F. D. Monckton,  
Clerk.





No.

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**United States Circuit Court of Appeals**  
**FOR THE NINTH CIRCUIT**

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## INDEX.

	Page
Appeal, Assignment of Errors on.....	214
Appeal, Bond on .....	219
Appeal, Citation on .....	1
Appeal, Order allowing .....	213
Appeal, Petition for .....	213
Answer .....	143
Assignment of Errors on appeal.....	214
Bill of Complaint .....	2
Bill of Complaint, Demurrer to .....	139
Bill of Complaint, Order overruling Demurrer to .....	142
Bond on Appeal .....	219
Citation on Appeal.....	1
Clerk's Certificate to Transcript.....	548
Decree, Final .....	210
Demurrer to Bill of Complaint.....	139
Demurrer to Bill of Complaint, Order overruling	142
Evidence, Statement of .....	221
Evidence, Order approving Statement of.....	544
EXHIBITS TO BILL OF COMPLAINT:	
"A" .....	36
"B" .....	42
"C" .....	55
"D" .....	72
"E" .....	78
"F" .....	101
"G" .....	127
"H" .....	131



INDEX. Page

EXHIBITS :

Plaintiff's Exhibit 22.....	336
Plaintiff's Exhibit 69.....	329
Plaintiff's Exhibit 70.....	329
Plaintiff's Exhibit 71.....	329
Plaintiff's Exhibit 72.....	329
Defendant's Exhibits 1 to 14.....	315
Defendant's Exhibit 190 .....	316
Defendant's Exhibit 195 .....	364
Defendant's Exhibit 198 .....	366
Defendant's Exhibit 200 .....	367
Defendant's Exhibit 203 .....	341
Defendant's Exhibit 205 .....	343
Defendant's Exhibit 206 .....	370
Defendant's Exhibit 207 .....	370
Defendant's Exhibit 208 .....	371
Defendant's Exhibit 209 .....	345
Defendant's Exhibit 210 .....	347
Defendant's Exhibit 211 .....	349
Defendant's Exhibit 212 .....	351
Defendant's Exhibit 213 .....	353
Defendant's Exhibit 216 .....	303
Defendant's Exhibit 218 .....	302
Defendant's Exhibit 219 .....	371
Defendant's Exhibit 222 .....	379
Defendant's Exhibit 240 .....	410
Defendant's Exhibit 241 .....	419
Defendant's Exhibit 242 .....	439
Defendant's Exhibit 243 .....	500

INDEX.

Page

Exhibits—Continued:

Letter, Elijah Smith to Geo. W. Loggie, July 1, 1887 .....	355
Letter, Elijah Smith to C. A. Dolph, July 1, 1887 .....	357
List of Stockholders.....	358
Statement of Payments for Coos Bay & Roseburg Wagon Road Lands.....	361
Letter, Prosper W. Smith to Barnabas Holmes, May 24, 1887.....	362
Letter, D. R. Murphy to United States At- torney General .....	437
List of Exhibits.....	529
Summary of certain Exhibits.....	402
Opinion .....	191
Order allowing Appeal.....	213
Order approving Statement of the Evidence...	544
Order overruling Demurrer to Bill of Complaint	142
Petition for Appeal.....	213
Petition for Rehearing .....	209
Præcipe for Transcript.....	546
Rehearing, Petition for.....	209
Replication .....	190
Statement of the Evidence.....	221
Statement of the Evidence, Order approving...	544

## INDEX.

Page

## TESTIMONY :

## WITNESSES FOR PLAINTIFF :

A. Admunson .....	397
J. L. Barker .....	392
Frank Batter .....	386
Almon S. Buell.....	400
W. F. Burton.....	398
J. S. Clinton.....	395
J. L. Crosby.....	394
John Fitzgerald .....	398
Earl Harlocker .....	389
E. N. Harry.....	401
Sarah Haughton .....	399
J. M. Hutson.....	394
M. J. Kinney.....	320
Marshal J. Kinney.....	400
D. C. Krantz.....	393
J. Krantz .....	393
J. D. Laird.....	390-398
George W. Loggie.....	381
C. T. McKnight.....	332
E. P. Mast .....	247
G. P. Miller .....	391
W. R. Murray .....	390
George K. Quine.....	387
A. J. Radabaugh.....	399
A. T. Siglin.....	387
Charles R. Smith .....	409
G. W. Stevenson .....	390
George Watkins .....	322
Isaac Taylor Weekly.....	397
J. C. Wilson.....	396



INDEX. Page

TESTIMONY—Continued:

WITNESSES FOR DEFENDANT:

Herbert Armstrong .....	297-363
J. D. Benham .....	230
Albert E. Bettis .....	235
William Bettis .....	237
A. E. Bushnell .....	245
W. J. Coates .....	244
W. Z. Cotton .....	225
W. W. Crapo .....	249
George S. Gothro .....	284-318
S. A. Gurnery .....	243
John F. Hall .....	226
W. W. Halverstott .....	232
J. C. Haynes .....	238
C. G. Hockett .....	285
A. W. Johnson .....	397
J. J. Klinkenbeard .....	241
L. A. Lawhorn .....	231
T. W. Newland .....	222
George Norris .....	234
H. A. Pargeter .....	315
L. E. Rose .....	240
William Rotch .....	260
Robert E. Shine .....	294
A. M. Simpson .....	396
L. D. Smith .....	227
J. P. Stemler .....	224
D. J. Thrift .....	229
J. A. Yoakam .....	279
Transcript, Præcipe for .....	546
Transcript, Clerk's Certificate to .....	548

No.....

*United States Circuit Court of Appeals for the  
Ninth Circuit.*

THE SOUTHERN OREGON COMPANY,  
*Appellant,*

*vs.*

THE UNITED STATES OF AMERICA,  
*Appellee.*

---

NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD:

Dolph, Mallory, Simon & Gearin,  
Mohawk Building, Portland, Oregon,  
for the Appellant.

Mr. Constantine J. Smyth,  
Special Assistant to the Attorney General,  
and

Mr. Clarence L. Reames,  
United States Attorney,  
Post Office Building, Portland, Oregon,  
for the Appellee.

CITATION ON APPEAL.

*United States of America, District of Oregon, ss.*

TO UNITED STATES OF AMERICA, GREETING:

Whereas the Southern Oregon Company has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, Oregon, in said District, this 9th day of December, in the year of our Lord, one thousand, nine hundred and fifteen.

CHAS. E. WOLVERTON,

Judge.

Due service of this citation admitted at Portland, Oregon, this December 9th, 1915.

C. J. SMYTH,

Special Assistant to Attorney General.

Filed December 9, 1915.

G. H. MARSH,

Clerk.



2    *United States vs. Southern Oregon Company*

*In the Circuit Court of the United States for the  
District of Oregon.*

October Term 1910.

BE IT REMEMBERED, That on the 27th day of December, 1910, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to-wit:

BILL OF COMPLAINT.

In the Circuit Court of United States for the District  
of Oregon, Ninth Judicial Circuit.

In Equity.

United States of America, Complainant,

vs.

Southern Oregon Company, Defendant.

No. —.

To the Judges of the Circuit Court of the United  
States for the District of Oregon:

The United States of America, by George W. Wickersham, its Attorney-General, presents this its bill in equity against the Southern Oregon Company, a citizen of the State of Oregon.

Thereupon your Orator complains and says:

I.

The Southern Oregon Company now is, and at all the times hereinafter mentioned as to it was, a corporation organized under the laws of the State of Oregon, and a resident and citizen of said state.

II.

On or about the 3rd day of March A. D. 1869, the

Congress of the United States passed an Act (15 Stat., 340), entitled,

“An Act granting Lands to the State of Oregon to aid in the Construction of a military Wagon Road from the navigable Waters of Coos Bay to Roseburg in said State,”

which said Act was approved by the President of the United States upon said 3rd day of March, A. D. 1869, and is in terms as follows:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road: *Provided*, That the lands hereby granted shall be exclusively applied to the construction of said road and to no other purpose, and shall be disposed of only as the work progresses: *Provided further*, That the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section, and for a price not exceeding two dollars and fifty cents per acre: *And provided further*, That any and all lands heretofore reserved to the United States, or otherwise appropriated by act of Congress or other competent authority, be, and the same are hereby, reserved from the operation of this Act, except so far as it may be necessary to locate

#### 4 *United States vs. Southern Oregon Company*

the route of said road through the same, in which case the right of way to the width of one hundred feet is granted: *And provided further*, That the grant hereby made shall not embrace any mineral lands of the United States, or any lands to which homesteads of pre-emption rights have attached.

Sec. 2. And be it further enacted, That the lands hereby granted to said State shall be disposed of by the Legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the Government of the United States, free from tolls or other charges upon the transportation of any property, troops, or mails of the United States.

Sec. 3. And be it further enacted, That said road shall be constructed with such width, graduation, and bridge as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

Sec. 4. And be it further enacted, That the State of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands, not previously reserved to the United States nor otherwise disposed of, and not exceeding six miles in distance from it, equal to the amount reserved from the operation of this Act in the first section of the same, to be selected in alternate odd sections, as provided in section first of this Act.

Sec. 5. And be it further enacted, That lands hereby granted to said State shall be disposed of only in the following manner, that is to say, when



the Governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed then a quantity of the land hereby granted, not to exceed thirty sections, may be sold, and so on from time to time, until said road shall be completed; and if said road is not completed within five years no further sale shall be made, and the lands remaining unsold shall revert to the United States: *Provided, however,* That the entire amount of public land granted by this act shall not exceed three sections per mile for each mile actually constructed.

Sec. 6. And be it further enacted, That the United States Surveyor General for the District of Oregon shall cause said lands, so granted, to be surveyed at the earliest practicable period after said State shall have enacted the necessary legislation to carry this Act into effect."

### III.

Through inadvertence the aforesaid Act of Congress contained no provision authorizing the issuance of patents for the lands granted by said Act, and to correct this omission (not only as to the aforesaid Act, but as to certain other Acts similarly situated) on or about the 18th day of June, A. D. 1874, the Congress of the United States passed an Act (18 Stats., Part 3, 80), entitled,

"An Act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases,"

which said Act was approved by the President of the

## 6 *United States vs. Southern Oregon Company*

United States upon said 18th day of June, A. D. 1874, and is in terms as follows:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the Governor of the State of Oregon, as in said Act provided, to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon, as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: *Provided*, That this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled.”

### IV.

On or about the 22nd day of October, A. D. 1870, the Legislative Assembly of the State of Oregon passed an act entitled,

“An Act donating certain lands to the Coos Bay Wagon Road Company,”

which said Act was approved by the Governor of the State of Oregon upon said 22nd day of October, A. D. 1870, and is in terms as follows:

*“Be it enacted by the Legislative Assembly of the State of Oregon,*

Section 1. That there is hereby granted to the Coos Bay Wagon Road Company all lands, rights-of-way, privileges, and immunities heretofore granted or pledged to this State by the Act of Congress, in this Act heretofore recited for the purpose of aiding said company in constructing the road mentioned and described in said Act of Congress, upon the conditions and limitations therein prescribed.

Section 2. There is also hereby granted and pledged to said company all moneys, lands, rights, privileges and immunities which may be hereafter granted to this State to aid in the construction of such road for the purposes, and upon the conditions and limitations mentioned in said Act of Congress, or which may be mentioned in any further grants of money or lands to aid in constructing such road.

Section 3. Inasmuch as there is no law upon this subject at the present time this Act shall be in force from and after its passage.”

## V.

The said Coos Bay Wagon Road Company was, at all the times herein mentioned as to it, a corporation organized under the laws of the State of Oregon.

The wagon road provided for by the terms of said Act of Congress approved March 3, 1869, together with all of the lands granted in aid of the construction thereof as aforesaid, during all the times herein mentioned, were, and are, situated in the Counties

of Coos and Douglas in the State of Oregon, and within the Land District of the United States attached to the United States Land Office situated at Roseburg in the said State of Oregon.

## VI.

Upon the passage and approval of said Act of the Legislative Assembly of the State of Oregon approved October 22, 1870, the said Coos Bay Wagon Road Company assumed to, and thereafter did, in the manner hereinafter set forth and not otherwise, exercise and enjoy the several rights, privileges and benefits of the aforesaid Acts of Congress and the aforesaid Act of the Legislative Assembly of the State of Oregon.

During the years A. D. 1873, A. D. 1874, and A. D. 1876, the said Coos Bay Wagon Road Company, did, in the manner provided in and contemplated by the aforesaid Acts of Congress, represent and certify to the officers of the United States having authority in the premises that the said Coos Bay Wagon Road Company had wholly constructed and completed the wagon road provided for in and contemplated by the aforesaid Acts of Congress, and was lawfully entitled to all of the lands granted by the aforesaid Act of Congress approved March 3, 1869; and said Coos Bay Wagon Road Company did, during said years A. D. 1873, A. D. 1874, and A. D. 1876, in form and manner as required by the aforesaid Acts of Congress and the rules and regulations of the Interior Department of the United States applicable thereto, apply for patents for all of the



lands claimed by the said Coos Bay Wagon Road Company under the aforesaid Acts of Congress.

Thereafter, and pursuant to the premises, your Orator, the United States of America, acting in the premises by and under the authority of the President of the United States, did issue and deliver to the said Coos Bay Wagon Road Company, the patents of the United States for all of the lands granted by the said Act of Congress approved March 3, 1869. The serial numbers of said patents (numbered as to said grant) the dates thereof, and the quantity of land embraced therein, respectively, are as follows, to-wit:

Patent No. 1, dated February 12, 1875, embracing 42,496.93 acres;

Patent No. 2, dated March 18, 1876, embracing 1,080.00 acres;

Patent No. 3, dated November 8, 1876, embracing 61,111.53 acres;

Patent No. 4, dated February 17, 1877, embracing 431.65 acres.

The lands patented as aforesaid aggregate 105,120.11 acres.

## VII.

Prior to the 31st day of May, A. D. 1875, the said Coos Bay Wagon Road Company sold and conveyed approximately 6,963 acres of the aforesaid granted lands to approximately fifty-three purchasers. A schedule accurately setting forth the names of the purchasers of said lands, the lands so sold and conveyed (described by governmental subdivision), and

the dates of the conveyances therefor, respectively, is hereto appended marked Exhibit A, and is hereby made a part hereof.

#### VIII.

In evasion of the aforesaid restrictions upon the disposition and sale of the aforesaid granted lands, the Coos Bay Wagon Road Company and its officers and stockholders attempted to transfer to one person or corporation an unconditional fee simple title to 96,676.96 acres of said granted land, and to accomplish the said purpose and in violation of the aforesaid terms, provisions and conditions of the said Act of Congress approved March 3, A. D. 1869, the said Coos Bay Wagon Road Company and its officers and stockholders, on or about the 31st day of May, A. D. 1875, sold all of the aforesaid granted lands (excepting such of said lands as had been theretofore sold and conveyed as aforesaid), aggregating approximately 96,676.96 acres, to one purchaser, to-wit, one John Miller, and in that behalf, and with like purpose, intent and legal effect, said parties did enter into a certain contract in writing, bearing date the said 31st day of May, A. D. 1875, a true copy of which said contract is hereto appended, marked Exhibit B, and is hereby made a part hereof.

#### IX.

At the time the aforesaid contract last herein mentioned was entered into, none of the aforesaid granted lands had been patented, except 42,496.93 acres thereof embraced in said Patent No. 1, dated February 12, A. D. 1875. On said 31st day of May,

A. D. 1875, in partial execution of said contract last hereinbefore mentioned and described, and in violation of the aforesaid terms, provisions and conditions of said Act of Congress approved March 3, A. D. 1869, the said Coos Bay Wagon Road Company did execute and deliver to said John Miller, a certain instrument in writing, to-wit, a deed of conveyance, purporting to convey to said John Miller all of the aforesaid granted lands embraced in said Patent No. 1, excepting such thereof as had been theretofore otherwise sold and conveyed as aforesaid. The lands embraced in said deed of conveyance aggregated 35,534 acres. A true copy of said last mentioned deed of conveyance is hereto appended, marked Exhibit C, and is hereby made a part hereof.

Upon said last mentioned date, to-wit, the 31st day of May, A. D. 1875, in further partial execution of said contract mentioned and described in paragraph VIII hereof, and in further violation of the aforesaid terms, provisions and conditions of said Act of Congress approved March 3, A. D. 1869, said Coos Bay Wagon Road Company did execute and deliver to said John Miller a certain instrument in writing, to-wit, a deed of conveyance, bearing date said 31st day of May, A. D. 1875, purporting to convey unto the said John Miller the aforesaid wagon road in aid of the construction of which the said Act of Congress approved March 3, A. D. 1869, was enacted. A true copy of said last mentioned deed of conveyance is hereto appended, marked Exhibit D, and is hereby made a part hereof.

## X.

Upon information and belief your Orator further says:

In all of the transactions herein mentioned as to him, the said John Miller had no actual beneficial interest, but on the contrary was acting solely as the agent and for the benefit of one Collis P. Huntington, one Charles Crocker, one Leland Stanford and one Mark Hopkins. Said last named parties were the actual parties in interest, as purchasers, under said contract of May 31, A. D. 1875, entered into as aforesaid between said Coos Bay Wagon Road Company and the stockholders thereof and said John Miller; and likewise said Collis P. Huntington, Charles Crocker, Leland Stanford and Mark Hopkins were the real parties in interest under said deeds of conveyance executed and delivered by said Coos Bay Wagon Road Company to said John Miller as aforesaid. But for the purpose of concealing the true facts in the premises, said contract and deeds of conveyance were consummated in the name of said John Miller as purchaser.

## XI.

Pursuant to the premises last herein set forth, on or about the 22nd day of June, A. D. 1875, the said John Miller did execute and deliver to said Collis P. Huntington, Charles Crocker, Leland Stanford and Mark Hopkins two certain instruments in writing, to-wit, two deeds of conveyance, each bearing date said 22nd day of June, A. D. 1875, by the terms of one of which said deeds of conveyance said John



Miller did purport to convey to said Collis P. Huntington, Charles Crocker, Leland Stanford and Mark Hopkins the aforesaid wagon road, and by the terms of the other of which said deeds of conveyance said John Miller did purport to convey to said Collis P. Huntington, Charles Crocker, Leland Stanford and Mark Hopkins all of the aforesaid lands purported to have been conveyed to said John Miller by said Coos Bay Wagon Road Company, by said deed of conveyance bearing date May 31, A. D. 1875, (a copy of which is hereto appended, marked Exhibit C as aforesaid). Said deeds of conveyance executed and delivered by said John Miller to said Collis P. Huntington, Charles Crocker, Leland Stanford and Mark Hopkins were filed for record in the office of the Recorder for the County of Coos in said State of Oregon on the 14th day of July, A. D. 1875, said deed of conveyance purporting to convey said wagon road being recorded in Volume 5 of Deeds at pages 379 to 382 inclusive, of the records of said County Recorder's office, and said deed of conveyance purporting to convey said lands being recorded in Volume 5 of Deeds at pages 365 to 378 inclusive, of the records of said County Recorder's office. For greater particularity reference is hereby made to the said official records of said documents respectively.

## XII.

By the terms of said contract of May 31, A. D. 1875, between said Coos Bay Wagon Road Company and the stockholders thereof and said John Miller (a copy of which is hereto appended marked Ex-

hibit B) said Coos Bay Wagon Road Company did sell to said John Miller (for the use and benefit of others as aforesaid) all of the property of said Coos Bay Wagon Road Company; and by the terms of said contract the stockholders of said Coos Bay Wagon Road Company did sell and agree to assign to said John Miller (for use and benefit of others as aforesaid) all of the capital stock of said Coos Bay Wagon Road Company; the then Directors of said Coos Bay Wagon Road Company then and there agreeing, however, to continue to act as the Directors of said Coos Bay Wagon Road Company, for the use and benefit of said John Miller and the persons for whom he was acting in the premises as aforesaid.

The purpose, intent and practical effect of said last mentioned provisions of said contract of May 31, A. D. 1875, were to enable the persons who had purchased all of the lands granted by said Act of Congress approved March 3, 1869, as aforesaid, in violation of the terms, provisions and conditions of said Act of Congress as aforesaid, to conceal the premises from your Orator, and particularly the officers of the United States having authority in the premises, and to apply for, and obtain from your Orator, patents in the name of said Coos Bay Wagon Road Company, for that portion of said granted lands which were then unpatented.

Pursuant to the premises, the corporate existence of said Coos Bay Wagon Road Company was maintained, and each and all of the facts set forth in paragraphs VIII, IX, X, XI and XII hereof were

concealed from your Orator and from the aforesaid officers of the United States having authority in the premises, and your Orator was induced to and did issue and deliver to said Coos Bay Wagon Road Company its aforesaid patents numbered respectively 2, 3, and 4, embracing 62,623.18 acres, in ignorance of each and all of said facts.

### XIII.

On or about the 27th day of March, A. D. 1882, a certain instrument in writing, to-wit, a deed of conveyance, was executed and delivered to said Charles Crocker, by said Collis P. Huntington and Elizabeth Huntington, his wife, said Leland Stanford and Jane Lathrop Stanford, his wife, and Mary Frances Sherwood Hopkins as the sole heir of said Mark Hopkins, then deceased, bearing date the said 27th day of March, A. D. 1882, purporting to convey to and vest in said Charles Crocker the full legal title to all of the lands conveyed as aforesaid by said Coos Bay Wagon Road Company to said John Miller, and by said John Miller to said Collis P. Huntington, Charles Crocker, Leland Stanford and Mark Hopkins. Said deed of conveyance executed and delivered by said Collis P. Huntington and Elizabeth Huntington, his wife, said Leland Stanford and Jane Lathrop Stanford, his wife, and Mary Frances Sherwood Hopkins to said Charles Crocker was filed for record in the office of the Recorder for the County of Coos, in said State of Oregon, on the 2nd day of May, A. D. 1882, and was and is recorded in Volume 9 of Deeds, at pages 621 to



16 *United States vs. Southern Oregon Company*

631 inclusive, of the records of said County Records' office. For greater particularity reference is hereby made to the said official record of said document.

XIV.

The further execution of said contract of May 31, A. D. 1875, between said Coos Bay Wagon Road Company and the stockholders thereof and said John Miller (a copy of which is hereto appended marked Exhibit B), and particularly as to the lands embraced in said Patents numbered respectively 2, 3 and 4, was never consummated except as hereinafter stated.

The Oregon Southern Improvement Company, during all of the times herein mentioned as to it, was a corporation organized and existing under the laws of the State of Oregon. During the year A. D. 1883, said Oregon Southern Improvement Company entered into negotiations for the purchase of all of the lands sold and agreed to be conveyed by the terms of said contract of May 31, A. D. 1875 (a copy of which is hereto appended marked Exhibit B), including that part of said lands that had been theretofore conveyed in partial execution of said contract as aforesaid, and were then held by said Charles Crocker as aforesaid, and also that part of said lands still held by said Coos Bay Wagon Road Company and embraced in said patents numbered respectively 2, 3 and 4. Said negotiations resulted in the conveyance to said Oregon Southern Improvement Company, by mesne con-



veyances hereinafter mentioned and described, of all of said lands, aggregating 96,676.96 acres of the total 105,120.11 acres granted by the aforesaid Act of Congress approved March 3, A. D. 1869, and patented to said Coos Bay Wagon Road Company as aforesaid, that is to say:

On or about the 20th day of December, A. D. 1883, said Charles Crocker and Mary A. Crocker, his wife, did execute and deliver to one William H. Besse a certain instrument in writing, to-wit, a deed of conveyance, bearing date the said 20th day of December, A. D. 1883, purporting to convey unto the said William H. Besse all of the said lands then held by said Charles Crocker as aforesaid. Said deed of conveyance last herein described was filed for record in the office of the Recorder for the County of Coos, in said State of Oregon, on the 24th day of January, A. D. 1884, and was and is recorded in Volume 12 of Deeds, at pages 585 to 593 inclusive, of the records of said County Recorder's office. For greater particularity reference is hereby made to the said official record of said document.

On or about the 29th day of December, A. D. 1883, the said William H. Besse and Harriet C. Besse, his wife, executed and delivered to one Russell Gray a certain instrument in writing, to-wit, a deed of conveyance, bearing date the said 29th day of December, A. D. 1883, purporting to convey unto the said Russell Gray all of said lands conveyed unto said William H. Besse by said

Charles Crocker and Mary A. Crocker, his wife, as aforesaid. Said deed of conveyance executed and delivered by said William H. Besse and Harriet C. Besse, his wife, to said Russell Gray as aforesaid was filed for record in the office of the Recorder for the County of Coos, in said State of Oregon, on the 31st day of January, A. D. 1884, and was and is recorded in Volume 12 of Deeds, at pages 602 to 611, inclusive, of the records of said County Recorder's office. For greater particularity reference is hereby made to the said official record of said document.

On or about the 5th day of January, A. D. 1884, the said Russell Gray did execute and deliver to the said Oregon Southern Improvement Company a certain instrument in writing, to-wit, a deed of conveyance, bearing date the said 5th day of January, A. D. 1884, purporting to convey unto said Oregon Southern Improvement Company all of the lands conveyed by said William H. Besse and Harriet C. Besse, his wife, to said Russell Gray as aforesaid. Said deed of conveyance executed and delivered by said Russell Gray to said Oregon Southern Improvement Company as aforesaid was filed for record in the office of the Recorder for the County of Coos, in said State of Oregon, on the 31st day of January, A. D. 1884, and was and is recorded in Volume 12 of Deeds, at pages 611 to 620, inclusive, of the records of said County Recorder's office. For greater particularity refer-

ence is hereby made to the said official record of said document.

On or about the 7th day of January, A. D. 1884, and in violation of the aforesaid terms, provisions and conditions of said Act of Congress approved March 3, A. D. 1869, the said Coos Bay Wagon Road Company did execute and deliver to said William H. Besse a certain instrument in writing, to-wit, a deed of conveyance, bearing date the said 7th day of January, A. D. 1884, purporting to convey unto the said William H. Besse all of the lands embraced in said patents numbered respectively 2, 3 and 4, then remaining unsold (except to said John Miller by said contract of May 31, A. D. 1875, a copy of which, marked Exhibit B, is hereto appended), aggregating 61,143.37 acres. A true copy of said deed of conveyance is hereto appended, marked Exhibit E, and is hereby made a part hereof.

On or about the 4th day of June, A. D. 1884, the said William H. Besse and Harriet C. Besse, his wife, did execute and deliver to said Oregon Southern Improvement Company a certain instrument in writing, to-wit, a deed of conveyance, bearing date the 4th day of June, A. D. 1884, purporting to convey to the said Oregon Southern Improvement Company all of the lands conveyed to said William H. Besse by said Coos Bay Wagon Road Company as last aforesaid. Said deed of conveyance executed and delivered by said William H. Besse and Harriet C. Besse, his wife, to said Ore-

gon Southern Improvement Company was filed for record in the office of the Recorder for the County of Coos, in said State of Oregon, on the 18th day of September, A. D. 1884, and was and is recorded in Volume 13 of Deeds, at pages 354 to 364, inclusive, of the records of said County Recorder's office. For greater particularity reference is hereby made to the said official record of said document.

In each and all of the transactions herein mentioned as to them or either of them, the said William H. Besse and Russell Gray acted respectively as the agent and on behalf of said Oregon Southern Improvement Company.

In the meantime, said John Miller abandoned and released any and all alleged rights in the premises (your Orator not hereby admitting the existence or legality of any of said alleged rights).

#### XV.

On or about the 1st day of January, A. D. 1884, in violation of the aforesaid terms, provisions and conditions of said Act of Congress approved March 3, A. D. 1869, the said Oregon Southern Improvement Company did execute and deliver to the Boston Safe Deposit and Trust Company (a corporation then existing under the laws of the State of Massachusetts) a certain instrument in writing, to-wit, a deed of trust or mortgage, bearing date the said 1st day of January, A. D. 1884, purporting to convey and mortgage unto the said Boston Safe Deposit and Trust Company all property,



real and personal, then owned or thereafter to be acquired by said Oregon Southern Improvement Company, including the lands conveyed to said Oregon Southern Improvement Company as hereinbefore set forth, to secure the payment of certain bonds to be thereafter issued by said Oregon Southern Improvement Company, and which said deed of trust or mortgage, in violation of the aforesaid terms, provisions and conditions of said Act of Congress approved March 3, A. D. 1869, did in terms authorize and empower the said Boston Safe Deposit and Trust Company, and its successors in the aforesaid trust, in case of default in the payment of said bonds purported to be secured as aforesaid, to sell and cause to be sold the lands conveyed to said Oregon Southern Improvement Company as hereinbefore set forth, in one parcel, or in any quantity or quantities, and for the highest price obtainable, within the discretion of said trustee or trustees, and in disregard of the restrictions in that behalf established and enacted by the aforesaid Act of Congress approved March 3, A. D. 1869. A true copy of said deed of trust or mortgage is hereto appended, marked Exhibit F, and is hereby made a part hereof.

Thereafter, and on or about the 1st day of May, A. D. 1885, and with like purpose, intent and legal effect, the said Oregon Southern Improvement Company did execute and deliver to said Boston Safe Deposit and Trust Company a further

instrument in writing of like tenor and effect as said document last herein mentioned and described.

## XVI.

Thereafter, and on or about the 9th day of November, A. D. 1886, the said Boston Safe Deposit and Trust Company was succeeded by one William J. Rotch and one Edward D. Mandell as trustees under said deeds of trust or mortgages, respectively.

Thereafter, and on or about the 28th day of December, A. D. 1886, the said William J. Rotch and Edward D. Mandell, as trustees as aforesaid, instituted a certain suit in the Circuit Court of the United States for the District of Oregon against the Oregon Southern Improvement Company to foreclose said mortgages and execute said trusts, said suit being identified in the records and files of said Court as No. 1344; and thereupon and thereafter such proceedings were had therein that on the 11th day of April, A. D. 1887, it was decreed by said Court that said mortgages be foreclosed and that the said Oregon Southern Improvement Company do, within ten days from the date of said decree, pay to said William J. Rotch and Edward D. Mandell the sum of \$1,516,666.66, with interest thereon at the rate of 6 per cent per annum from the date of said decree until paid, together with the costs and disbursements of said suit, and that in default thereof, one of the Masters of said Court, to-wit, George H. Durham, do proceed to sell, in manner and form as upon an execution

issued upon a judgment at law, all the right, title and interest which the said Oregon Southern Improvement Company had at the date of the execution of said deeds of trust or mortgages respectively, or at the date of said decree, in or to certain property in said decree particularly described, including all of the lands conveyed to said Oregon Southern Improvement Company as hereinbefore set forth.

Thereafter, and on the 23rd day of June, A. D. 1887, at Empire City, in said Coos County, State of Oregon, pursuant to the premises, said George H. Durham, as Master of said Court as aforesaid, did sell to said William J. Rotch and one William W. Crapo, all of the property, real, personal and mixed, of said Oregon Southern Improvement Company, including its right, title and interest in and to said lands conveyed to said Oregon Southern Improvement Company as hereinbefore set forth. The price purported to have been paid by said purchasers for said property was the sum of \$120,000.00.

Thereafter, and on or about the 16th day of November, A. D. 1887, the said George H. Durham, as Master of said Court as aforesaid, did execute and deliver to said William J. Rotch and William W. Crapo a certain instrument in writing, to-wit, a Master's Deed of Conveyance, purporting to convey to said William J. Rotch and William W. Crapo, pursuant to the premises, all the right, title and interest that the said Oregon Southern Im-



## 24 *United States vs. Southern Oregon Company*

provement Company had at the date of the said deeds of trust or mortgage respectively, in and to the lands conveyed to said Oregon Southern Improvement Company as hereinbefore set forth. Said Master's Deed of Conveyance was filed for record in the office of the Recorder of the County of Coos, in said State of Oregon, on the 31st day of March, A. D. 1888, and was and is recorded in Volume 16 of Deeds, at pages 175 to 212, inclusive, of the records of said County Recorder's office. For greater particularity reference is hereby made to the said official record of said document.

On or about the 14th day of December, A. D. 1887, the said William J. Rotch and Clara M. Rotch, his wife, and said William W. Crapo and Sarah T. Crapo, his wife, did, for a nominal consideration, execute and deliver to the defendant Southern Oregon Company a certain instrument in writing, to-wit, a deed of conveyance, bearing date the said 14th day of December, A. D. 1887, purporting to convey to said defendant Southern Oregon Company all of the property conveyed or purported to be conveyed to said William J. Rotch and said William W. Crapo by said George H. Durham as Master of said Court aforesaid. Said deed of conveyance executed and delivered by said William J. Rotch and Clara M. Rotch, his wife, and said William W. Crapo and Sarah T. Crapo, his wife, to said Southern Oregon Company as aforesaid, was filed for record in the office of the Recorder for the County of Coos, in said State of



Oregon, on the 31st day of March, A. D. 1888, and was and is recorded in Volume 16 of Deeds, at pages 213 to 215, inclusive, of the records of said County Recorder's office. For greater particularity reference is hereby made to said official record of said document.

## XVII.

In all of the transactions hereinbefore set forth as to them or either of them, the said William J. Rotch, Edward D. Mandell and William W. Crapo acted as the agents and for the benefit of said Oregon Southern Improvement Company and the officers, stockholders and owners thereof. Said defendant Southern Oregon Company was organized by the officers, stockholders and owners of said Oregon Southern Improvement Company, and was in truth and in fact but a re-organization of said last named company. The stockholders of the defendant Southern Oregon Company were identical with the former stockholders of said Oregon Southern Improvement Company, and their respective interests in said defendant Southern Oregon Company were proportionately identical with their former respective interests in said Oregon Southern Improvement Company. And upon information and belief your Orator further says:

The aforesaid deeds of trust or mortgages executed and delivered to said Boston Safe Deposit and Trust Company were executed and delivered for the benefit and use of the officers, stockholders and owners of said Oregon Southern

Improvement Company. The alleged indebtedness secured by said mortgages was fictitious, feigned and untrue, and represented simply the interest of the stockholders, or certain thereof, of said Oregon Southern Improvement Company. Said mortgages executed and delivered to said Boston Safe Deposit and Trust Company as aforesaid were executed, delivered and foreclosed and caused to be executed, delivered and foreclosed by the officers, stockholders and owners of said Oregon Southern Improvement Company with the intent and in the hope that by the aforesaid foreclosure sale the aforesaid restrictions upon the sale and disposition of said granted lands established by the terms of said Act of Congress approved March 3, A. D. 1869, might be evaded and defeated, and that the rights of your Orator in the premises might be hindered, impaired and destroyed, and that the aforesaid conditional estate created by said Act of Congress approved March 3, A. D. 1869, might be converted into an unconditional estate for the use and benefit of the said officers, stockholders and owners of said Oregon Southern Improvement Company. None of said alleged bonds purported to have been secured by the aforesaid deeds of trust or mortgages were held or owned by others than the said officers, stockholders and owners of said Oregon Southern Improvement Company. The aforesaid alleged price purported to have been paid at said foreclosure sale (except such part thereof as was necessary to defray the expenses and costs

of said judicial proceedings and said foreclosure sale) were in fact paid, if at all, by the aforesaid officers, stockholders and owners of said Oregon Southern Improvement Company unto themselves, and constituted a mere nominal transaction designed and executed by the parties thereto for the purposes hereinbefore mentioned. For the reasons hereinbefore set forth, the execution, delivery and foreclosure of said deeds of trust and mortgages and the aforesaid foreclosure sale thereunder involved no actual change of interest whatsoever in the ownership of said lands or any part thereof.

#### XVIII.

In addition to said sales and conveyances of said granted lands mentioned and referred to in Paragraph VII hereof, and more particularly described in the schedule hereto appended marked Exhibit A, and since said 31st day of May, A. D. 1875, certain of said lands have from time to time been sold and conveyed in small quantities by the parties holding the legal title thereto as aforesaid. A schedule accurately setting forth the names of said purchasers of said lands, the lands so sold and conveyed (described by governmental subdivision), and the dates of the conveyances therefor, respectively, is hereto appended marked Exhibit G, and is hereby made a part hereof.

#### XIX.

The defendant Southern Oregon Company now claims to be the owner of all of the lands granted by said Act of Congress approved March 3, A. D.

1869, as aforesaid, excepting such thereof as have been conveyed as set forth in Paragraphs VII and XVIII hereof. A schedule accurately describing, by government subdivision, all of said lands now claimed by said defendant Southern Oregon Company as aforesaid, is hereto appended marked Exhibit H, and is hereby made a part hereof. No right, title, interest, or lien in, to or upon any of said lands is held or claimed except by said defendant Southern Oregon Company and your Orator as hereinbefore and hereinafter stated. All of said lands in this paragraph mentioned and referred to and particularly described in said Exhibit H are wild, unoccupied, and unimproved lands, and none thereof ever have been, or now are, reduced to possession. Said lands are of a value exceeding Four Millions of Dollars.

## XX.

The said Coos Bay Wagon Road Company and the said Oregon Southern Improvement Company have heretofore been and now are dissolved, pursuant to the statutes of the State of Oregon applicable to such matters.

## XXI.

At the time of, and during, each of the transactions hereinbefore set forth respectively, each and all of the aforesaid parties thereto respectively, knew each and all of the transactions that had theretofore transpired, as hereinbefore set forth, except as otherwise herein stated.



XXII.

In violation of the aforesaid terms, provisions and conditions of said Act of Congress approved March 3, A. D. 1869, the defendant Southern Oregon Company now asserts, and assumes to exercise and enjoy, an unconditional estate in and to all of said lands described in said schedule hereto appended and marked Exhibit H, free from each and all of the said terms, provisions and conditions of said Act of Congress approved March 3, A. D. 1869.

XXIII.

All of the lands granted by said Act of Congress approved March 3, A. D. 1869, during all of the times herein mentioned, were, and still are, situated in one of the most remote portions of the State of Oregon, and were and are difficult of access. As hereinbefore set forth, the said Coos Bay Wagon Road Company and the several parties claiming the legal title to the unsold portion of said granted lands, as the successors of said Coos Bay Wagon Road Company, respectively have from time to time been engaged in the sale of certain of said lands in small quantities and ostensibly pursuant to the aforesaid terms, provisions and conditions of said Act of Congress approved March 3, A. D. 1869. So far as known to your Orator, neither said Coos Bay Wagon Road Company nor any of said parties succeeding to the rights of said Coos Bay Wagon Road Company as aforesaid appeared to be, or were known to your Orator to be, claiming

or asserting any estate in said lands in violation of any of the aforesaid terms, provisions and conditions of said Act of Congress approved March 3, A. D. 1869. On the contrary, each and all of said parties ostensibly were asserting and claiming no rights in or to any of said lands, except as the beneficiaries of the general franchises and benefits of said Act of March 3, A. D. 1869, and subject to all of the aforesaid terms, provisions and conditions thereof. By reason of the premises, the aforesaid violations of the aforesaid terms, provisions and conditions of said Act of Congress approved March 3, A. D. 1869, were concealed from, and wholly unknown to, your Orator, until on or about the year A. D. 1907. Thereupon the matter of the aforesaid violations of the aforesaid terms, provisions and conditions of the aforesaid Act of Congress approved March 3, A. D. 1869, were presented to and considered by the Congress of the United States at the session thereof commencing in the month of December, A. D. 1907. Thereafter, and by Joint Resolution, approved April 30, A. D. 1908 (35 Stat., Part 1, 571), Congress did provide as follows:

“That the Attorney-General of the United States be, and he hereby is, authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any and all rights and remedies of the United States of America in any manner arising or growing out

of or pertaining to either or any of the following-described Acts of Congress, to-wit: \* \* \* \*; also 'An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, in said state,' approved March third, eighteen hundred and sixty-nine; \* \* \*, including all rights and remedies in any manner relating to the lands, or any part thereof, granted by either or any of said Acts; and in and by any and all such suits, actions, or proceedings the Attorney-General shall, in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States relating to the subject of such suits, actions and proceedings, including the claim on behalf of the United States that the lands granted by each of said Acts respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said Acts which may be alleged and established in any such suits, actions, or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being intended to fully authorize the Attorney-General in and by such suits, actions, or proceedings to assert on behalf of the United States and the court or courts before which such suits, actions, or proceedings may be instituted or pending to entertain, consider, and adjudicate the claim and right of the United States to such forfeiture

or forfeitures, and if found to enforce the same: *Resolved further*, that the authority and direction hereinbefore given shall extend to any and all suits, actions, or proceedings which may be instituted or pending under the authority of the Attorney-General at the time of the adoption and approval hereof."

Pursuant to the provisions of said last mentioned Joint Resolution of Congress, this suit is instituted.

#### XXIV.

By reason of the several aforesaid breaches and violations of the aforesaid terms, provisions and conditions of said Act of Congress approved March 3, A. D. 1869, all of said lands mentioned and described in said schedule hereto appended marked Exhibit H have been, and are, forfeited to your Orator, the United States of America, free from any and all right, title, interest, lien or claim of the defendant Southern Oregon Company. Pursuant to the authority and direction contained in said Joint Resolution of Congress approved April 30, A. D. 1908, your Orator does hereby assert, and does hereby resume, the title and ownership of all of said lands forfeited to your Orator as aforesaid.

#### XXV.

The defendant Southern Oregon Company has repeatedly threatened, and still threatens to, and will, unless restrained therefrom, sell, contract for sale, convey, or in some manner encumber or impair the title of said lands mentioned and de-



scribed in said schedule hereto appended marked Exhibit H; and said defendant Southern Oregon Company threatens to, and will, unless restrained therefrom, commit waste upon said lands and particularly as to the timber and other natural products thereof; all to the great and irreparable injury of your Orator in the premises.

To the end that the defendant Southern Oregon Company may be required to make full disclosure and discovery of all matters aforesaid, and according to the utmost and best of its knowledge, information, and belief, full, true, direct, and perfect answer make (but not under oath, an answer under oath being hereby waived) to the matters and things hereinbefore stated and charged; and that your Orator may have a decree from this Court:

(1) Adjudging and decreeing that all of those certain lands granted by said Act of Congress approved March 3, A. D. 1869, now claimed by said defendant Southern Oregon Company as aforesaid, and particularly described in said schedule hereto appended marked Exhibit H, have been and are forfeited to, and the title to all of said lands has been and is reverted to and reinvested in, and all of said lands now are the property of, your Orator, the United States of America;

(2) Quieting and confirming the title to your Orator in and to all of said lands, and particularly against any claim of any right, title, interest or lien in, to or upon the same or any part thereof,

by or on behalf of the defendant Southern Oregon Company or any person claiming or to claim under it;

(3) Forever enjoining and restraining the said defendant Southern Oregon Company, and its officers and agents, from in any manner claiming or asserting any right, title, interest or lien in, to or upon the aforesaid lands or any part thereof; and forever enjoining and restraining said defendant Southern Oregon Company, its officers and agents, from in any manner selling, or offering for sale, or conveying, or in any other manner disposing of, any of said lands, or from negotiating, executing or recording any document or instrument, or doing any other act or thing, which shall in any manner affect the use of or the title to any of said lands; and forever enjoining and restraining said defendant Southern Oregon Company, its officers and agents, from going upon any of said lands, and from cutting, removing, or in any other manner using any of the timber trees or other natural products thereof, and from in any manner committing waste thereupon, and from in any manner using or interfering with any of said lands:

That during the pendency of this suit, said defendant Southern Oregon Company, its officers and agents, be enjoined and restrained from the commission of any of the acts referred to in the preceding prayer for a permanent injunction;

That your Orator have such other and further relief as the equity of this case may require and

to Your Honors may seem meet and proper, including the costs of this suit;

May it please Your Honors to grant unto your Orator a writ of Subpoena directed to the said defendant Southern Oregon Company, commanding it on a day certain therein to be named, to appear before this Court on a certain day to be fixed by the Court, and to perform such order and decree in the premises as to the Court may seem meet and as may be required by the principles of equity and good conscience.

GEORGE W. WICKERSHAM,  
Attorney General of the United States.

JOHN McCOURT,  
United States Attorney of the District of Oregon.

B. D. TOWNSEND,  
Special Assistant to the Attorney General.

## EXHIBIT "A."

*Schedule containing all sales and conveyances made by the Coos Bay Wagon Road Company prior to May 31st, 1875.*

Name of Purchaser.	Date of Conveyance.	Description of Land.
D. S. Palmenteer	Mar. 14, 1873.	NE $\frac{1}{4}$ of NW $\frac{1}{4}$ , NW $\frac{1}{4}$ of NE $\frac{1}{4}$ , N $\frac{1}{2}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 21, Tp. 26 South, Range 12 West.
John B. Dudley.	Mar. 10, 1873.	Lot 3 of Sec. 29, Tp. 26 South, Range 12 West.
Stephen M. Masters.	Mar. 4 1873.	SE $\frac{1}{4}$ of NE $\frac{1}{4}$ , NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 19, Tp. 26 South, Range 12 West.
E. C. Catching.	Mar. 4, 1873.	N $\frac{1}{2}$ of SW $\frac{1}{4}$ , SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 33, Tp. 26 South, Range 12 West.
W. G. Schofield.	May 2, 1873.	S $\frac{1}{4}$ of NE $\frac{1}{4}$ , NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 15, Tp. 27 South, Range 13 West.
H. W. Holverstott.	May 10, 1873.	SE $\frac{1}{4}$ of Sec. 23, Tp. 27 South, Range 12 West.
Donald McKay.	Apr. 7, 1873.	W $\frac{1}{2}$ of E $\frac{1}{2}$ of Sec. 13, Tp. 26 South, Range 13 West.
C. Harner.	Mar. 10, 1873.	NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 29, Tp. 26 South, Range 12 West.
B. F. Ross.	Apr. 30, 1873.	W $\frac{1}{2}$ of SE $\frac{1}{4}$ , SE $\frac{1}{4}$ of SW $\frac{1}{4}$ and Lot 7 of Sec. 5, Tp. 26 South, Range 12 West.



*Schedule containing all sales and conveyances made by the Coos Bay Wagon Road Company prior to May 31st, 1875.—Continued.*

Name of Purchaser.	Date of Conveyance.	Description of Land.
H. C. Drollinger.	Mar. 10, 1873.	Fractional SE $\frac{1}{4}$ of Sec. 7, Tp. 26 South, Range 12 West.
William Morras.	June 25, 1873.	SE $\frac{1}{4}$ of Sec. 21, Tp. 27 South, Range 13 West.
Elizabeth Morras.	June 25, 1873.	E $\frac{1}{4}$ of SW $\frac{1}{4}$ , SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 21, Tp. 27 South, Range 13 West.
James Catching.	May 4, 1873.	N $\frac{1}{2}$ of NW $\frac{1}{4}$ (being Lots 3 and 4) of Sec. 5, Tp. 27 South, Range 12 West.
S. C. Braden.	Mar. 10, 1873.	SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 25, Tp. 27 South, Range 12 West.
John Levingston.	Mar. 10, 1873.	NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 29; Lots 1 and 2 of Sec. 29; Lots 3 and 4 of Sec. 21; Tp. 26 South, Range 12 West.
Elijah Morris.	Aug. 21, 1873.	N $\frac{1}{2}$ of NE $\frac{1}{4}$ of Sec. 27, Tp. 27 South, Range 13 West.
A. H. Moors.	Aug. 27, 1873.	NE $\frac{1}{4}$ of Sec. 21, Tp. 27 South, Range 13 West.
Sarah A. Moore.	Aug. 27, 1873.	N $\frac{1}{2}$ of NW $\frac{1}{4}$ , SE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 21, Tp. 27 South, Range 13 West.

*Schedule containing all sales and conveyances made by the Coos Bay Wagon Road Company prior to May 31st, 1875.—Continued.*

Name of Purchaser.	Date of Conveyance.	Description of Land.
Stephen M. Masters.	Sep. 2, 1873.	SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 19, Tp. 26 South, Range 12 West.
Thomas Johnson.	Mar. 10, 1873.	W $\frac{1}{2}$ of NE $\frac{1}{4}$ and Lots 1, 2, 3, 4, of Sec. 17, Tp. 26 South, Range 12 West.
Gilbert Hall.	Mar. 9, 1873.	NE $\frac{1}{4}$ of NW $\frac{1}{4}$ , SW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 11, Tp. 27 South, Range 13 West.
D. L. Watson.	Apr. 8, 1873.	SE $\frac{1}{4}$ of NE $\frac{1}{4}$ , NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 9, Tp. 27 South, Range 13 West.
Jeremiah Palmanteer	Aug. 14, 1873.	SE $\frac{1}{4}$ of NW $\frac{1}{4}$ , SE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 21, Tp. 26 South, Range 12 West.
Edw. Levine.	Sep. 29, 1873.	SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 3, Tp. 26 South, Range 12 West.
John Conner.	Mar. 4, 1873.	NE $\frac{1}{4}$ of SW $\frac{1}{4}$ and Lot 2 of Sec. 21, Tp. 26 South, Range 12 West.
Owen Caulfield.	Aug. 12, 1873.	NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 29, Tp. 27 South, Range 12 West.

*Schedule containing all sales and conveyances made by the Coos Bay Wagon Road Company prior to May 31st, 1875.—Continued.*

Name of Purchaser.	Date of Conveyance.	Description of Land.
Brazee Stickney.	Sep. 24, 1873.	Lot 1 (being NW $\frac{1}{4}$ of NW $\frac{1}{4}$ ) of Sec. 33, Tp. 26 South, Range 12 West.
Erick John Nyberg.	Sep. 29, 1873.	Lot 12 of Sec. 17, Tp. 26 South, Range 12 West.
John M. Hodson.	Nov. 1, 1873.	SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 11, Tp. 26 South, Range 12 West.
Chas. E. Fox.	Nov. 1, 1873.	W $\frac{1}{2}$ of NW $\frac{1}{4}$ of Sec. 15, Tp. 27 South, Range 13 West.
A. A. Carper.	Dec. 6, 1873.	Lot 4 of Sec. 3, Tp. 27 South, Range 13 West.
J. M. Eberline.	Dec. 6, 1873.	NW $\frac{1}{4}$ , E $\frac{1}{2}$ of SW $\frac{1}{4}$ , NW $\frac{1}{4}$ of SW $\frac{1}{4}$ and Lot 1 of Sec. 13, Tp. 26 South, Range 13 West; SE $\frac{1}{4}$ of SE $\frac{1}{4}$ , W $\frac{1}{2}$ of SE $\frac{1}{4}$ , SW $\frac{1}{4}$ , S $\frac{1}{2}$ of NW $\frac{1}{4}$ of Sec. 19, Tp. 26 South, Range 12 West.
Abram May.	Mar. 10, 1873.	NW $\frac{1}{4}$ of Sec. 29, Tp. 27 South, Range 12 West.
Mary A. Sluper.	Feb. 16, 1874.	Lot 5 of Sec. 3, Tp. 27 South, Range 13 West.
Chas. F. Wheeler.	Mar. 4, 1874.	E $\frac{1}{2}$ of NE $\frac{1}{4}$ , NE $\frac{1}{4}$ of SW $\frac{1}{4}$ , SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 35, Tp. 26 South, Range 13 West.

*Schedule containing all sales and conveyances made by the Coos Bay Wagon Road Company prior to May 31st, 1875.—Continued.*

Name of Purchaser.	Date of Conveyance.	Description of Land.
John S. Collins. T. G. Owen.	June 30, 1873. Apr. 8, 1873.	SE $\frac{1}{4}$ of Sec. 35, Tp. 26 South, Range 13 west. N $\frac{1}{2}$ of NW $\frac{1}{4}$ , NW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 35, Tp. 26 South, Range 13 West.
D. L. Watson.	Apr. 8, 1873.	NW $\frac{1}{4}$ of SW $\frac{1}{4}$ , S $\frac{1}{2}$ of NW $\frac{1}{4}$ of Sec. 35, Tp. 26 South, Range 13 West.
D. L. Watson.	June 30, 1873.	SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 35, Tp. 26 South, Range 13 West.
H. H. Lewis.	Apr. 23, 1874.	NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 35, Tp. 27 South, Range 13 West.
J. C. Haynes. Coos Bay & Oregon Coal Company.	Mar. 9, 1873. June 25, 1874.	NW $\frac{1}{4}$ of Sec. 25, Tp. 26 South, Range 13 West. SW $\frac{1}{4}$ of Sec. 25, Tp. 26 South, Range 13 West.
Daniel Bridges. Wm. R. Pogue. Fred W. Utter. A. V. Ojedo.	July 28, 1874. Mar. 10, 1873. Feb. 28, 1874. Feb. 28, 1874.	SW $\frac{1}{4}$ of Sec. 27, Tp. 27 South, Range 13 West. NW $\frac{1}{4}$ of Sec. 3, Tp. 27 South, Range 13 West. NW $\frac{1}{4}$ of Sec. 23, Tp. 27 South, Range 13 West. SE $\frac{1}{4}$ of Sec. 23, Tp. 27 South, Range 13 West.



*Schedule containing all sales and conveyances made by the Coos Bay Wagon Road Company prior to May 31st, 1875.—Continued.*

Name of Purchaser.	Date of Conveyance.	Description of Land.
William Utter. S. H. Emerson.	Feb. 28, 1874. Mar. 10, 1873.	NE $\frac{1}{4}$ of Sec. 23, Tp. 27 South, Range 13 West. SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 25, Tp. 27 South, Range 13 West.
Hiram Bettys. Jane Ojedo. D. W. Moore. Thos. J. Beale.	Oct. 4, 1874. Feb. 28, 1874. May 6, 1873. Feb. 8, 1875.	NE $\frac{1}{4}$ of Sec. 23, Tp. 27 South, Range 12 West. SW $\frac{1}{4}$ of Sec. 23, Tp. 27 South, Range 13 West. N $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 13, Tp. 27 South, Range 13 West. SE $\frac{1}{4}$ , S $\frac{1}{2}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 21, Tp. 26 South, Range 12 West; W $\frac{1}{2}$ , W $\frac{1}{2}$ of E $\frac{1}{2}$ , NE $\frac{1}{4}$ of NE $\frac{1}{4}$ , SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 9; All of Sec. 17, Tp. 27 South, Range 13 West.
James L. Masters.	No date.	NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 9, Tp. 28 South, Range 7 West.

In the foregoing schedule the following abbreviations are used:

The letters "N, S, E and W," meaning respectively, north, south, east and west; also "Sec." and "Tp.," meaning respectively section and township. The numerical designation of townships and ranges have reference to the Willamette Meridian and the base line thereof.

#### EXHIBIT "B."

This agreement, made this 31st day of May, A. D., 1875, by and between the Coos Bay Wagon Road Company, a corporation duly organized under and by virtue of the laws of the State of Oregon, party of the first part, and S. Hamilton, James Hamilton, J. Frank Hamilton, Aaron Rose, Thomas J. Beale, James F. Watson, David L. Watson, J. M. Eberline, A. T. Green, J. Green, Samuel C. Flint and A. R. Flint, stockholders of the Coos Bay Wagon Road Company, parties of the second part, and John Miller, party of the third part,

Witnesseth: That whereas the said party of the first part is the owner in fee simple of certain lands situated in Douglas and Coos Counties in the State of Oregon, for which a patent has been duly issued by the Government of the United States to the party of the first part, bearing date the twelfth day of February, 1875, and the said party of the first part claims to be entitled to certain other lands not yet surveyed, but which are hereafter to be surveyed and patented by the United States to the party of the first part, situated in

said Counties and State, all of which are claimed and held under certain laws of the United States and of the State of Oregon, namely, Act of Congress approved March 3, 1869, entitled "An Act granting lands to the State of Oregon, Etc.," and an Act of the Legislative Assembly of the State of Oregon, approved October 26, 1870;

And, whereas, the said party of the first part desires to sell to the party of the third part, all of the said lands patented and not yet patented, less the exceptions made in schedule "A" hereto attached, and the parties of the second part desire to sell to the said party of the third part, the Coos Bay Wagon Road and all of the stock which they respectively hold of the stock of the said Coos Bay Wagon Road Company, which comprises all of the capital stock of said corporation, and the party of the third part desires to purchase all of the said lands, road and stock,

Now, therefore, It is agreed by and between said parties as follows, viz.:

First. The party of the first part, for the consideration of one dollar per acre United States Gold Coin, to be paid as hereinafter named, covenants and agrees to grant and convey, by good and sufficient deeds of conveyance, all of said lands, and all of said Coos Bay Wagon Road, to the party of the third part, and the parties of the second part covenant and agree to assign, transfer and convey to the party of the third part, all of said stock for the same consideration above ex-

pressed. And the said party of the third part covenants and agrees to buy said lands, road and said stock and pay therefor the said sum of one (1) dollar per acre United States Gold Coin, at the times and in the manner hereinafter stated.

Second. Said land for which patent is issued is described in Patent No. 1 issued by the Government of the United States to the party of the first part, February 12th, 1875, and in schedule "C," and said stock with the names of the respective owners is specified in schedule "B," both of which said schedules are hereto attached and made a part of this contract.

Third. The title to said lands shall be derived through patents issued and to be issued by the United States to the party of the first part and the said title, when it passes to the party of the third part, shall be free from all liens and incumbrances and shall be a fee simple.

Fourth. The land for which a patent has at this date been issued, shall be conveyed, less the exceptions named in schedule "A," to the party of the third part, as soon as he shall have inspected said patent and found the title to said lands as provided in subdivision third, and thereafter whenever a patent shall have been issued for any or all of the other lands in like manner, the same shall be conveyed to him.

Fifth. The said S. Hamilton, Aaron Rose, Thomas J. Beale, J. M. Eberline and A. R. Flint shall each retain one share of said stock and shall



act as trustees of said corporation until all of the lands accruing to it shall have been surveyed, patented and transferred to said Miller as hereinbefore mentioned, but the balance of said stock shall be assigned to L. B. Benchly and be held by him until this contract shall have been complied with and fully performed by the party of the third part, then it and the said shares so retained by said trustees shall be transferred to the party of the third part or to his assigns; and the said S. Hamilton, Aaron Rose, Thomas J. Beale, J. M. Eberline, and A. R. Flint as such trustees or otherwise, agree to do no act or thing which shall impair this contract or contravene the intent or spirit thereof.

Sixth. Upon the execution and delivery of the said deed which shall convey to him the land for which a patent has been issued and the assignment of said stock to L. B. Benchly, the party of the third part shall pay to the party of the first part the sum of one (1) dollar in United States Gold Coin per acre, at Roseburg in Oregon for land so deeded.

Seventh. Upon the delivery of said deed and the payment for the land therein described the possession and control of all of the said land and all of the Coos Bay Wagon Road shall pass to the party of the third part, and from thenceforward he shall pay all of the expenses incurred thereafter of the road and be entitled to all of the emoluments arising therefrom, and he shall pay all of the expenses

of the road since May 1st, 1875, and be entitled to all of the receipts therefrom.

Eighth. Whenever a patent shall hereafter be issued for any of the said lands and the conveyance shall be made as provided in subdivision fourth, then the party of the third part shall pay to the said party of the first part at the rate of one (1) dollar per acre Gold Coin for each acre conveyed.

Ninth. The money paid on the delivery of deed or deeds is to be distributed to the present stockholders, less the amount required to pay off all of the present liabilities of the corporation and the future liabilities not provided for in this contract, and for the purposes of the distribution of said purchase money it is understood that the corporation is the trustee of the said parties of the second part hereto.

Tenth. Upon the delivery of first deed, payment of purchase money and execution of this agreement, each party hereto shall make, execute and exchange bonds respectively in the full sum of forty thousand (\$40,000) dollars Gold Coin of the United States for the faithful performance of all of the conditions of this agreement, to-wit: For the sale of residue of said land when surveyed and patented and the stock of said Coos Bay Wagon Road Company and for the purchase thereof and the payment therefor at the rate hereinbefore provided.

Eleventh. All of the franchises, rights and property connected with the Coos Bay Wagon Road,

and all property real and personal used and employed in operating and maintaining said road, shall be free from all liens and incumbrances. Also all the debts and liabilities of said corporation shall be fully paid and discharged up to the first day of May, 1875; the debts and liabilities which may have accrued subsequently to May 1st, 1875, and up to the time of the delivery of the possession of said road to said party of the third part shall be only such as may have been contracted in the ordinary course of managing and keeping in repair the said road, but shall not include damages resulting from mismanagement or carelessness or otherwise. A conveyance of said Wagon Road to the party of the third part shall be made at the time of the delivery of possession thereof to him.

In testimony whereof, the said party of the first part has hereunto caused its corporate seal to be affixed and these presents to be signed by its President and Secretary duly authorized by resolution, and the said parties of the second and third part have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and De-	COOS BAY WAGON
livered in presence of:	ROAD COMPANY,
As to John Miller—	By S. HAMILTON,
E. B. MASLICK.	President.
A. T. GREEN.	J. F. WATSON, Secy.

48 *United States vs. Southern Oregon Company*

As to Hamilton and  
Watson and stock-  
holders—

L. F. LANE.

J. T. HAMILTON.

(C. B. W. R. Co.'s Seal.)

S. HAMILTON.

THOMAS J. BEALE.

JEPHTHA GREEN.

JOHN M. EBERLINE.

A. T. GREEN.

A. R. FLINT.

D. L. WATSON,

By his attorney,

S. HAMILTON.

J. W. HAMILTON,

By his attorney,

S. HAMILTON.

AARON ROSE.

J. F. HAMILTON.

SAMUEL C. FLINT.

J. F. WATSON.

JNO. MILLER.

STATE OF OREGON, County of Douglas, ss.

On this 31st day of May, A. D. 1875, personally appeared before me, a County Clerk in and for said County, the above named S. Hamilton, whose signature appears to the foregoing instrument as the President of the Coos Bay Wagon Road Company, and he acknowledged to me that he signed the same as such and affixed the corporate seal of the said company thereto by order of the directors of said company, and that the seal affixed thereto is the seal of said Coos Bay Wagon Road Company, and that he executed the same freely and voluntarily for the uses and purposes therein named.



In witness whereof, I have hereunto set my hand and affixed my official seal at Roseburg, Douglas County, Oregon, the day and the year first above written.

(Seal of Douglas County.) E. STEPHENS,  
County Clerk.

STATE OF OREGON, County of Douglas, ss.

On this 6th day of June, 1875, personally appeared before me, a Notary Public in and for said County, the above named J. F. Watson, whose signature appears to the foregoing instrument as the Secretary of the Coos Bay Wagon Road Company, and who is well known to me to be the identical same person he represents himself to be and who executed said instrument and he acknowledged that he signed the same as such and affixed the corporate seal of said company thereto by the order of the directors of said company and that the seal affixed thereto is the Corporate Seal of said Coos Bay Wagon Road Company, and that he executed the same freely and voluntarily for the purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my Notarial Seal this day and year above written.

(Seal.) L. F. LANE, Notary Public.

*Schedule "B."**Stockholders of the Coos Bay Wagon Road Company.*

Capital Stock	Number of Shares	
\$40,000.00	400.	
Names of Stockholders—	Number of Shares.	
S. Hamilton.....	Ninety	90
James Hamilton.....	Five	5
Frank Hamilton.....	Five	5
Aaron Rose.....	Sixty	60
Thomas J. Beale.....	Sixty	60
James F. Watson.....	Thirty	30
David L. Watson.....	Fifteen	15
J. M. Eberline.....	Twenty	20
A. T. Green.....	Ten	10
Samuel C. Flint.....	Five	5
A. R. Flint.....	Ninety-five	95
J. Green.....	Five	5

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Total.....Four Hundred 400

I, S. Hamilton, President of the Coos Bay Wagon Road Company, hereby certify that the foregoing list is true and correct.

S. HAMILTON,  
President of the Coos Bay Wagon Road Company.

Dated Roseburg, Oregon, May 31st, 1875.

*Schedule.*

*South of Base Line and West of Willamette Meridian Unsurveyed and Unpatented.*

Twp. Range.

25	12	Parts of Secs. 19, 29 & all of 23 .....Unsurveyed
28	12	All of Township excepting Secs. 31, 32, 33, 34, 35, & 36, included in Coos Bay Road Grant .....Yet unsurveyed
27	11	West half of Township.. “ “
28	11	All of Township ..... “ “
29	11	Secs. 1, 2, 3, 4, 5 & 6 in Road Grant ..... “ “
28	10	All of Township ..... “ “
29	10	Secs. from 1 to 12 inclusive “ “
28	9	All of Township ..... “ “
29	9	Secs. from 1 to 12 inclusive “ “
28	8	About one-third of Town- ship . ..... “ “

Supposed to contain in the aggregate about sixty-two thousand (62,000) acres. This schedule is supposed to contain all the lands to which the said Coos Bay Wagon Road Company may be entitled, not yet patented, but if there are or shall hereafter be any other lands to which said corporation may be entitled then the same shall be included in the contract to which this schedule is attached, and the same shall be controlled by said contract the same as if specifically described in this schedule.

Office of the Coos Bay Wagon Road Company,  
Roseburg, May 31st, 1875.

At a meeting of the stockholders of the Coos Bay Wagon Road Company, held on the 31st day of May, A. D. 1875, the following named stockholders were present, who were all of the stockholders of said Company, to-wit: S. Hamilton, A. R. Flint, Aaron Rose, J. M. Eberline, Jeptha Green, A. T. Green, T. J. Beale, S. Collins Flint, J. Hamilton, D. L. Watson (by his attorney S. Hamilton), J. W. Hamilton (by his attorney S. Hamilton).

On motion of Mr. A. R. Flint, seconded by Mr. Thomas J. Beale, S. Hamilton was appointed chairman of the meeting, and A. T. Green was appointed secretary. Mr. A. R. Flint offered the following resolution, viz.:

Resolved: That it is for the best interests of all the stockholders of the corporation known as and called the Coos Bay Wagon Road Company, to grant, bargain, sell and convey to John Miller, all of the real and personal property now belonging to said corporation, namely, all of the real estate which has been patented, and which may be hereafter patented, to the said corporation except such as has already been sold or bonded by this corporation to other parties: Also the Wagon Road known as the Coos Bay Wagon Road, leading from Coos Bay to Roseburg, and all of the franchises, rights and property belonging and appertaining to said road and used and employed in connection therewith. The consideration therefor to be such sum



of money as shall be equal to one dollar in Gold Coin of the United States for each acre of land which shall be conveyed to said Miller. And the trustees of said corporation are hereby empowered to enter a contract to the effect aforesaid with said Miller, to grant, bargain, sell and convey the said property real and personal to said Miller, and make such covenants and agreements, with such terms of payment, as to them may seem proper. And we hereby ratify and confirm all of the acts and doings of said trustees in the matter aforesaid.

And the said resolution was unanimously adopted.

I, A. T. Green, Secretary of the above-mentioned meeting of the stockholders of the Coos Bay Wagon Road Company, hereby certify that the foregoing is a true and correct transcript from the minutes of said meeting of the resolution then adopted and passed by said meeting.

Witness my hand this 31st day of May, A. D. 1875.

A. T. GREEN, Secretary.

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Office of the Coos Bay Wagon Road Company,  
Roseburg, May 31st, 1875.

At a meeting of the board of trustees of the Coos Bay Wagon Road Company held at the office of the corporation at Roseburg on this 31st day of May, A. D. 1875, among other proceedings the following resolution was adopted:

Resolved, that the President and Secretary be and they are hereby authorized and empowered, in the name and on behalf of the said corporation, to enter into, make, execute and seal with the corporate seal of the company an agreement with John Miller of San Francisco, California, for the sale of lands belonging to said Company already patented or hereafter to be patented to said Company, and also for the sale of the Coos Bay Wagon Road, and to make, execute, seal and deliver good and sufficient deed or deeds in fee simple for said lands in accordance with said agreement: Also in the name and on behalf of said Company to convey to said Miller the said Wagon Road and all property appertaining thereto.

I, J. F. Watson, Secretary of the Coos Bay Wagon Road Company, hereby certify that the foregoing is a true and correct transcript from the records of Coos Bay Wagon Road Company in my possession as Secretary.

In witness whereof, I have hereunto set my hand and affixed the seal of said Company this 4th day of June, A. D. 1875.

(C. B. W. R. Co.'s Seal) J. F. WATSON,

Secretary of Coos Bay Wagon Road Company,

STATE OF OREGON, County of Douglas, ss.

On this 31st day of May, A. D. 1875, personally appeared before me S. Hamilton, Thomas J. Beale, Jephtha Green, John M. Eberline, D. L. Watson, by his attorney S. Hamilton, J. W. Hamilton, by his

attorney S. Hamilton, Aaron Rose, J. Frank Hamilton and Saml. C. Flint, who are personally known to me to be the identical persons described in and who executed the within conveyance and who acknowledged to me having executed the same freely for the purposes therein set forth.

Witness my hand and seal of office the year and day last above written.

(Seal.) E. STEPHENS, County Cleary,  
By ROBERT NEWCOMB, Dept.

STATE OF OREGON, County of Douglas, ss.

On this 6th day of June, A. D. 1875, personally appeared before me J. F. Watson, who is personally known to me to be the identical same person mentioned in and who signed the foregoing instrument, and acknowledged that he executed the same freely for the purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year above written.

(Seal.) F. L. LANE, Notary Public.

EXHIBIT "C."

*Coos Bay Wagon Road Company to John Miller.  
Deed of Lands.*

Known all men by these presents: That the Coos Bay Wagon Road Company, a corporation duly organized under the laws of the State of Oregon, and represented herein by S. Hamilton, its President, and J. F. Watson, its Secretary, being thereunto duly authorized by virtue of a resolution

of the stockholders of said corporation, and by a resolution of the trustees of said corporation, copies of which resolutions are attached hereto and hereby made a part of this deed, for and in consideration of the sum of Thirty-five Thousand Five Hundred and Thirty-four and 00-100 Dollars in Gold Coin of the United States, to it in hand paid by John Miller, of the City and County of San Francisco in the State of California, at or about the en-sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said John Miller, his heirs and assigns forever, all of the following described tracts or parcels of land, situated in Douglas County in the State of Oregon, and in Coos County in said State, being all of the lands granted by the Act of Congress approved March 3, 1869, entitled "An Act granting lands to the State of Oregon to aid in the construction of a Military Wagon Road from the navigable waters of Coos Bay to Roseburg in said State, and granted by the Act of the Legislative Assembly of the State of Oregon, approved October 26th, 1870, to the Coos Bay Wagon Road Company. Embraced and described in Patent No. 1 issued by the Government of the United States to the Coos Bay Wagon Road Company, bearing date February 12th, A. D. 1875. Except such tracts as have been already sold and disposed of by said Company (a list of which tracts have been delivered to said



John Miller). The lands granted, bargained, sold and conveyed hereby are described as follows, to-wit: Situated in Coos County, South of the Base Line and West of Willamette Meridian. Township Twenty-six, Range Twelve, Lots numbered one, two, three and four, South half of Northeast quarter, South half of Northwest quarter, and South half of Section one, containing Six hundred and thirty-five and 7-100 acres; Lots numbered one, two, three and four, South half of Northeast quarter, South half of Northwest quarter, Northeast quarter of Southeast quarter, South half of Southwest quarter, and Northwest quarter of Southwest quarter Section three, containing Four hundred and eighty-three acres and 4-100 of an acre; Lots one, two, five, six and eight (1, 2, 5, 6 & 8), East half of Southeast quarter, South half of Northeast quarter, Northeast quarter of Southwest quarter, and Southeast quarter of Northwest quarter of Section five, containing Three hundred and ninety-five acres and 88-100 of an acre.

7: Lot numbered Six, and West half of the Northeast quarter of Section seven, containing Eighty-nine acres and 55-100 of an acre.

9: Lots numbered three and four, East half of section, East half of Southwest quarter, and Northeast quarter of Northwest quarter of Section nine, containing Five hundred and thirty-eight acres and 94-100 of an acre.

11: North half of Southeast quarter, East half of Southwest quarter, Northwest quarter of South-

west quarter of Section eleven, containing Six hundred acres.

13: All of Section thirteen, containing Six hundred and forty acres.

15: All of Section fifteen, containing Six hundred and forty acres.

23: All of Section twenty-three, containing Six hundred and forty acres.

25: All of Section twenty-five, containing Six hundred and forty acres.

27: All of Section Twenty-seven, containing Six hundred and forty acres.

35: All of Section thirty-five, containing Six hundred and forty acres.

17: East half of Northeast quarter, Northeast quarter of Southeast quarter of Section seventeen, containing One hundred and twenty acres.

North half of Northeast quarter, and North half of Northwest quarter of Section nineteen, containing One hundred and fifty-eight acres and 66-100 of an acre.

Southeast quarter of Southwest quarter, Northeast of Northeast quarter, and Northeast quarter of Northwest quarter of Section twenty-one, containing One hundred and twenty acres.

Southeast quarter of Southeast quarter of Section twenty-nine, containing Forty acres.

Lots numbered one, two, three, four Southeast quarter, East half of Northwest quarter, and East half of Southwest quarter of Section thirty-one,

containing Four hundred and eighty-two acres and 98-100 of an acre.

East half, East half of Northwest quarter, and Southeast quarter of Southwest quarter of Section thirty-three, containing Four hundred and forty acres.

*Township Twenty-five, Range Twelve.*

Southeast quarter of Southeast quarter of Section nineteen, containing Forty acres.

North half of Northeast quarter, North half of Northwest quarter, Southeast quarter of Northwest quarter, and Southwest quarter of Northeast quarter of Section twenty-nine, containing Two hundred and forty acres.

West half of Section thirty-three, containing Three hundred and twenty acres.

*Township Twenty-Seven, Range Twelve.*

1: All Section one, containing Six hundred and forty-four acres.

3: All of Section three, containing Six hundred and forty-two acres and 60-100 of an acre.

East half of section, Southwest quarter, South half of Northwest quarter of Section five, containing Five hundred and sixty and seven hundredths acres.

All of Section seven, containing Six hundred and forty-eight acres and 58-100 of an acre.

All of Section nine, containing Six hundred and forty acres.

All of Section eleven, containing Six hundred and forty acres.

All of Section thirteen, containing Six hundred and forty acres.

All of Section fifteen, containing Six hundred and forty acres.

All of Section seventeen, containing Six hundred and forty acres.

All of Section nineteen, containing Six hundred and forty acres and 66-100 of an acre.

Northeast quarter, East half of Northwest quarter, Southeast quarter and East half of Southwest quarter of Section twenty-one, containing Four hundred and eighty acres.

West half of Section twenty-three, containing Three hundred and twenty acres.

East half and East half of Southwest quarter of Section twenty-five, containing Four hundred acres.

All of Section twenty-seven, containing Six hundred and forty acres.

East half of Northeast quarter, Southwest quarter of Northeast quarter and Southeast quarter of Section twenty-nine, containing Two hundred and eighty acres.

All of Section thirty-three, containing Six hundred and forty acres.

South half, South half of Northeast quarter, South half of Northwest quarter, Northeast quarter of Northeast quarter, and Northwest quarter of Northwest quarter of Section thirty-five, containing Five hundred and sixty acres.

Lots numbered three and four, Southeast



quarter, South half of Northeast quarter, East half of Southwest quarter, and Southeast quarter of Northwest quarter of Section thirty-one, containing Four hundred and forty-two acres.

*Township Twenty-six, Range Thirteen.*

North half of Southeast quarter, and Southwest quarter of Southeast quarter of Section one, containing One hundred and twenty acres.

East half of Northeast quarter, and East half of Southeast quarter of Section thirteen, containing One hundred and sixty acres.

Lots six and seven of Section twenty-three, containing Twenty-eight acres and 58-100 of an acre.

East half of Section twenty-five, containing Three hundred and twenty acres.

*Township Twenty-seven, Range Thirteen.*

Lots numbered one, two, three, four, Southeast quarter, South half of Northeast quarter, South half of Northwest quarter, North half of Southwest quarter, and Southeast quarter of the Southwest quarter of Section one, containing Five hundred and eighty-two acres and 66-100 of an acre.

Lots one, two and six, and West half of Southeast quarter of Section three, containing One hundred and thirty-five acres and 20-100 of an acre.

South half, South half of Northeast quarter, and Southeast quarter of Northwest quarter of Section eleven, containing Four hundred and forty acres.

North half Southwest quarter, South half of Southeast quarter of Section thirteen, containing Five hundred and sixty acres.

North half, Southwest quarter, North half of Southeast quarter and Southwest quarter of Southeast quarter of Section twenty-five, containing Six hundred acres.

North half and Southeast quarter of Section twenty-seven, containing Four hundred and eighty acres. Except the North half of Northeast quarter thereof.

North half and Northeast quarter of Southwest quarter of Section thirty-five, containing Three hundred and sixty acres.

*In Douglas County, Oregon, Township Twenty-eight, Range Six.*

Lot ten of Section seven, containing Twenty-seven acres and 50-100 of an acre. Northwest quarter of Section nine, containing One hundred and sixty acres.

Southeast quarter of Southwest quarter, and South half of Southeast quarter of Section twenty-three, containing One hundred and twenty acres.

*Township Twenty-eight, Range Seven.*

All of Section nineteen, containing Six hundred and fifty-six acres and 96-100 of an acre.

North half, North half of Southeast quarter, Northeast quarter of Southwest quarter, and West half of Southwest quarter of Section twenty-one, containing Five hundred and twenty acres.

Lots numbered one, two, three, four, five, six, seven and eight of Section twenty-three, containing One hundred and ninety-seven acres and 93-100 of an acre.

Lot numbered ten, West half of Northeast quarter, and Northwest quarter of Section twenty-three, containing two hundred and forty-five acres and 52-100 of an acre.

West half of Northwest quarter of Section twenty-five, containing Eighty acres.

Lots numbered three and four of Section twenty-seven, containing Eighty-four acres and 82-100 of an acre.

Lots numbered one, five, six, seven, eight, nine and ten, and North half of Northwest quarter of Section twenty-nine, containing Two hundred acres and 64-100 of an acre.

Lot numbered three of Section thirty-one, containing Thirty-two acres and 50-100 of an acre.

Lots numbered one and two of Section thirty-three, containing Fifty-three acres and 45-100 of an acre.

Southeast quarter and East half of Southwest quarter of Section thirty-five, containing Two hundred and forty acres.

*Township Twenty-eight, Range Eight.*

Southwest quarter and South half of Southeast quarter of Section thirty-one, containing Two hundred and forty acres and 76-100 of an acre.

Southeast quarter and South half of Southwest

quarter of Section thirty-three, containing Two hundred and forty acres.

Northeast quarter, East half of Northwest quarter, North half of Southeast quarter and Northeast quarter of Southwest quarter of Section thirty-five, containing Three hundred and sixty acres.

*Township Twenty-nine, Range Seven.*

Lots numbered one, two, three, Southwest quarter of Northeast quarter, South half Northwest quarter, Northwest quarter of Southeast quarter, and Southwest quarter of Section seven, containing Four hundred and thirteen acres and 90-100 of an acre.

*Township Twenty-nine, Range Eight.*

Lots numbered one, two, three, seven, eight and nine, North half of Northeast quarter, and Northeast quarter of Northwest quarter of Section one, containing Two hundred and thirty-two acres and 38-100 of an acre.

All of Section three, containing Six hundred and thirty-three acres and 82-100 of an acre.

All of Section five, containing Six hundred and twenty-eight acres and 82-100 of an acre.

Northeast quarter of Northeast quarter, and Northwest quarter of Section seven, containing Two hundred and eleven acres and 36-100 of an acre.

All of Section nine, containing Six hundred and forty acres.

East half of Northeast quarter, Southwest quarter of Northwest quarter, Northwest quarter and



South half of Section eleven, containing Six hundred acres.

North half of Section fifteen, containing Three hundred and twenty acres.

Lot numbered three, and Northeast quarter of Northeast quarter of Section seventeen, containing Seventy-six acres and 30-100 of an acre.

*Township Twenty-nine, Range Nine.*

North half and Southwest quarter of Section one, containing Four hundred and seventy-seven acres and 64-100 of an acre.

South half of Northeast quarter, Southeast quarter and West half of Section eleven, containing Five hundred and sixty acres.

*Township Twenty-eight, Range Six.*

Fractional Northeast quarter of Northeast quarter, and fractional Northwest quarter of Northeast quarter of Section three, containing Nine acres and 30-100 of an acre.

*Township Twenty-eight, Range Seven.*

Northeast quarter, Northwest quarter, East half of Southeast quarter, and Northwest quarter of Southwest quarter of Section five, containing Four hundred and forty-three acres and 8-100 of an acre.

Northwest quarter of Northeast quarter, Northwest quarter, East half of Southeast quarter, Southwest quarter of Southeast quarter, and Southeast quarter of Southwest quarter of Section seven, containing Three hundred and sixty-four acres and 57-100 of an acre.

Northeast quarter of Northeast quarter, Southwest quarter of Northeast quarter, Northwest quarter of Northwest quarter, Southeast quarter of Southeast quarter, West half of Southeast quarter, and South half of Southwest quarter of Section nine, containing Three hundred and twenty acres.

Southwest quarter of Southeast quarter of Section eleven, containing Forty acres.

South half of Northwest quarter, North half Southwest quarter, and Southwest quarter of Southwest quarter of Section thirteen, containing Two hundred acres.

Lots numbered one, two, three, four, five and six, Southwest quarter of Southeast quarter and South half of Southwest quarter of Section fifteen, containing Two hundred and forty-two acres and 74-100 of an acre.

Southwest quarter of Northeast quarter and Southwest quarter of Section seventeen, containing Two hundred acres.

*Township Twenty-eight, Range Eight.*

Southeast quarter of Northwest quarter of Section one, containing Forty acres.

West half of Northeast quarter and West half of Section eleven, containing Four hundred acres.

East half of Northeast quarter, Southwest quarter of Northeast quarter, Southeast quarter of Northwest quarter, Southeast quarter, East half of Southwest quarter, Southwest quarter of Southwest quarter of Section thirteen, containing Four hundred and forty acres.

Lots numbered two and three, Northwest quarter of Northeast quarter, Northeast quarter of Northwest quarter, West half of Northwest quarter, and West half of Southwest quarter of Section fifteen, containing Two hundred and ninety-one acres and 29-100 of an acre. (Deduct Lot No. 3 and Southwest quarter of Northwest quarter of Section fifteen—76.83 acres being sold.)

Lot numbered four, Southeast quarter of Southeast quarter, West half of Southeast quarter, and Southwest quarter of Section twenty-three, containing Three hundred and nineteen acres and 99-100 of an acre.

Northwest quarter, and Northwest quarter of Southwest quarter of Section twenty-five, containing Two hundred acres.

All of Section twenty-seven, containing Six hundred and forty acres.

North half of Northeast quarter, and Northwest quarter of Section thirty-one, containing Two hundred and forty-four acres and 66-100 of an acre.

North half, and North half of Southwest quarter of Section thirty-three, containing Four hundred acres.

West half of Northwest quarter of Section thirty-five, containing Eighty acres.

All of said tracts, containing in the aggregate Thirty-five thousand five hundred thirty-three and 59-100 acres, together with all appurtenances thereunto belonging or in any wise appertaining.

To have and to hold all of the said tracts above

described with all appurtenances thereunto in any way appertaining or belonging unto the said John Miller, his heirs and assigns forever.

In witness whereof, the said Coos Bay Wagon Road Company has caused its corporate seal to be hereunto affixed and its corporate name to be hereunto subscribed by its President and its Secretary thereto, duly authorized by resolution as aforesaid this 31st day of May, A. D. Eighteen Hundred and Seventy-five.

COOS BAY WAGON ROAD COMPANY,

By S. HAMILTON, President.

and J. F. WATSON, Secretary.

Signed, sealed and delivered in presence of:  
as to S. Hamilton's signature:

JOHN H. CAMMET.

A. T. GREEN.

As to signature of J. F. Watson:

L. F. LANE.

J. B. NOBLE.

STATE OF OREGON, County of Douglas, ss.

On this 31st day of May, A. D. 1875, personally appeared before me, a County Clerk in and for said County, the above named S. Hamilton, whose signature appears to the foregoing instrument as the President of the Coos Bay Wagon Road Company, and he acknowledged to me that he signed the same as such and affixed the Corporate Seal of said Company thereto by order of the Directors of said Company and that the seal affixed thereto is the



seal of said Coos Bay Wagon Road Company, and that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof, I hereunto set my hand and affixed my official seal at Roseburg, Douglas County, Oregon, this the day and year first above written.

(Seal.)            E. STEPHENS, County Clerk.

STATE OF OREGON, County of Douglas, ss.

On this 7th day of June, A. D. 1875, personally appeared before me, a Notary Public in and for said County and State, the above named J. F. Watson, whose signature appears to the foregoing instrument as the Secretary of the Coos Bay Wagon Road Company, and he acknowledged to me that he signed the same as such and affixed the Corporate Seal thereto of said Company by the order of the Directors of said Company, and that the seal affixed thereto is the corporate seal of said Coos Bay Wagon Road Company, and that he executed the same freely and voluntarily for the purposes therein named.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

(Seal.)            L. F. LANE, Notary Public.

Office of the Coos Bay Wagon Road Company,  
Roseburg, May 31st, 1875.

At a meeting of the Stockholders of the Coos Bay Wagon Road Company held on this 31st day of May, A. D. 1875, the following named stockholders were present, who were all of the stockholders of said Company, to-wit: S. Hamilton, A. T. Green, D. L. Watson (by his attorney, S. Hamilton), J. M. Eberline, A. R. Flint, T. J. Beal, Aaron Rose, S. Collins Flint, Jephtha Green, J. Frank Hamilton, J. W. Hamilton (by his attorney, S. Hamilton).

On motion of A. R. Flint, seconded by Mr. T. J. Beal, S. Hamilton was appointed Chairman of the meeting, and A. T. Green was appointed Secretary. Mr. A. R. Flint offered the following resolution, viz.:

Resolved, that it is for the best interest of all the stockholders of the Corporation, known as and called the Coos Bay Wagon Road Company, to grant, bargain, sell and convey to John Miller all of the real and personal property now belonging to said Corporation, namely, all of the real estate which has been patented and which may be hereafter patented to the said Corporation, except such as has already been sold and bonded by this Corporation to other parties. Also the Wagon Road, known as the Coos Bay Wagon Road, leading from Coos Bay to Roseburg, and all of the franchises, rights and property belonging and appertaining to said road, and used and employed in connection

therewith. The consideration therefor to be such sum of money as shall be equal to one dollar in Gold Coin of the United States, for each acre of land which shall be conveyed to said Miller. And the trustees of said Corporation are hereby empowered to enter into a contract to the effect aforesaid with said Miller to grant, bargain, sell and convey the said property, real and personal, to said Miller and make such covenants and agreements, with such terms of payment, as to them may seem proper.

And we hereby ratify and confirm all of the acts and doings of said trustees in the matter aforesaid. And this said resolution was unanimously adopted.

I, A. T. Green, Secretary of the above mentioned meeting of the Stockholders of the Coos Bay Wagon Road Company, hereby certify that the foregoing is a true and correct transcript from the minutes of said meeting of the resolution then adopted and passed by said meeting.

Witness my hand this 31st day of May, A. D. 1875.

A. T. GREEN, Secretary.

Office of Coos Bay Wagon Road Company,  
Roseburg, May 31st, 1875.

At a meeting of the Board of Trustees of the Coos Bay Wagon Road Company, held at the office of the Corporation at Roseburg on this the 31st day of May, A. D. 1875, among other proceedings the following resolution was adopted:

Resolved, that this President and Secretary be and they are hereby authorized and empowered in the name and on behalf of the said Corporation to enter into, make, execute and seal with the Corporate Seal of the Company an agreement with John Miller, of San Francisco, California, for the sale of lands belonging to said Company already patented or hereafter to be patented to said Company; and also for the sale of the Coos Bay Wagon Road, and to make, execute, seal and deliver good and sufficient deed or deeds in fee simple for said lands in accordance with said agreement. Also in the name and on behalf of said Company to convey to said Miller the said Wagon Road and all property appertaining thereto.

I, J. F. Watson, Secretary of Coos Bay Wagon Road Company, hereby certify that the foregoing is a true and correct transcript from the records of Coos Bay Wagon Road Company in my possession as Secretary.

In witness whereof, I have hereunto set my hand and affixed the seal of said Company this seventh day of June, A. D. 1875.

(Seal.)

J. F. WATSON,

Secretary of Coos Bay Wagon Road Company.

#### EXHIBIT "D."

*Coos Bay Wagon Road Company to John Miller—  
Deed of Wagon Road.*

Know all men by these presents: That the Coos Bay Wagon Road Company, a corporation duly incorporated under the laws of the State of Oregon,



represented herein by S. Hamilton, its President, and J. F. Watson, its Secretary, and being thereunto duly authorized by virtue of the resolution of the Stockholders, and of a resolution of the Trustees of said corporation, copies of which are hereunto attached and made a part of this deed, for and in consideration of the sum of Thirty-seven thousand and two hundred (\$37,200) dollars in United States Gold Coin, to it paid by John Miller, of the City and County of San Francisco, State of California, at or about the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey, unto the said John Miller, his heirs and assigns forever, all of that certain Military Wagon Road situated in Douglas County and in Coos County, in the State of Oregon, and running from the navigable waters of Coos Bay to Roseburg in said State, and all of the land over and upon which the said road passes and is situated, to the width of fifty (50) feet on each side of the center of said road, and also all of the land, toll houses, toll gates, buildings, tools, wagons, carts, implements and property connected and used in, upon and about said road, also all franchises, rights, privileges and property appertaining to said road held and which may be held and which might be held and exercised by said corporation as freely and to the same extent as if the said road remained the property of said corporation.

But all of the land granted to said corporation by the United States and the State of Oregon shall not be affected by this deed except so far as the same is used for the purposes of running and operating said road.

To have and to hold all of said road as above described with all of said appurtenances thereunto belonging or in any wise appertaining unto the said John Miller, his heirs and assigns forever.

In witness whereof, the said Coos Bay Wagon Road Company has caused its corporate seal to be hereunto affixed and its corporate name to be hereunto subscribed by its President and Secretary thereunto duly authorized by resolution as aforesaid this 31st day of May, A. D. One thousand eight hundred and seventy-five.

COOS BAY WAGON ROAD COMPANY,  
(Seal) By S. HAMILTON, President.  
J. F. WATSON, Secretary.

Signed, sealed and delivered in presence of:

As to signature of S. Hamilton:

JOHN H. CAMMET.

A. P. GREEN.

STATE OF OREGON, County of Douglas, ss.

On this 31st day of May, A. D. 1875, personally appeared before me, a County Clerk in and for said County, the above named S. Hamilton, whose signature appears to the foregoing instrument as the President of the Coos Bay Wagon Road Company, and he acknowledged to me that he signed the same

as such and affixed the Corporate Seal of said Company thereto by order of the Directors of said Company, and that the seal affixed thereto is the seal of said Coos Bay Wagon Road Company, and that he executed the same freely and voluntarily for the uses and purposes therein named.

In witness whereof, I hereunto set my hand and affixed my Official Seal at Roseburg, Douglas County, Oregon, the day and year first above written.

(Seal.) E. STEPHENS, County Clerk.

Office of Coos Bay Wagon Road Company,  
Roseburg, May 31st, 1875.

At a meeting of the Board of Trustees of the Coos Bay Wagon Road Company held at the office of the corporation at Roseburg on this the 31st day of May, A. D. 1875, among other proceedings the following resolution was adopted:

Resolved, that the President and Secretary be and they are hereby authorized and empowered in the name and on behalf of the said corporation to enter into, make, execute and seal with the corporate seal of the Company an agreement with John Miller, of San Francisco, California, for the sale of lands belonging to said Company already patented or hereafter to be patented to said Company, and also for the sale of the Coos Bay Wagon Road, and to make, execute, seal and deliver good and sufficient deed or deeds in fee simple for said lands in accordance with said agreement, also in

the name and on behalf of said Company to convey to said Miller the said Wagon Road and all property appertaining thereto.

I, J. F. Watson, Secretary of Coos Bay Wagon Road Company, hereby certify that the foregoing is a true and correct transcript from the Records of Coos Bay Wagon Road Company in my possession as Secretary.

In witness whereof, I have hereunto set my hand and affixed the seal of said Company this 6th day of June, A. D. 1875.

(Seal.)

J. F. WATSON,

Secretary of Coos Bay Wagon Road Company.

Office of the Coos Bay Wagon Road Company,  
Roseburg, May 31st, 1875.

At a meeting of the stockholders of the Coos Bay Wagon Road Company held on this 31st day of May, A. D. 1875, the following named stockholders were present, who were all of the stockholders of said Company, to-wit: S. Hamilton, Jephtha Green, J. Frank Hamilton, A. R. Flint, A. T. Green, D. L. Watson (by his attorney, S. Hamilton), Aaron Rose, T. J. Beal, J. M. Eberline, S. Collins Flint, J. W. Hamilton (by his attorney, S. Hamilton).

On motion of A. R. Flint, seconded by T. J. Beal, S. Hamilton was appointed Chairman of the meeting and A. T. Green was appointed Secretary. Mr. A. R. Flint offered the following resolution:



Resolved, that it is for the best interest of all the stockholders of the corporation known as and called the Coos Bay Wagon Road Company to grant, bargain, sell and convey to John Miller all of the real and personal property now belonging to said corporation, namely, all of the real estate which has been patented and which may hereafter be patented to said corporation, except such as has already been sold or bonded by this Company to other parties. Also the Wagon Road known as the Coos Bay Wagon Road, leading from Coos Bay to Roseburg, and all of the franchises, rights and property belonging and appertaining to said road and used and employed in connection therewith. The consideration therefor to be such sum of money as shall be equal to one dollar in Gold Coin of the United States for each acre of land which shall be conveyed to said Miller. And the trustees of said corporation are hereby empowered to enter into a contract to the effect aforesaid with said Miller, to grant, bargain, sell and convey the said property, real and personal, to said Miller and make such contracts and agreements, with such terms of payments, as to them may seem proper. And we hereby ratify and confirm all of the acts and doings of said trustees in the matter aforesaid. And the said resolution was unanimously adopted.

I, A. T. Green, Secretary of the above mentioned meeting of the stockholders of the Coos Bay Wagon Road Company, hereby certify that the foregoing is a true and correct transcript from the minutes

of said meeting of the resolution then adopted and passed by said meeting.

Witness my hand this 31st day of May, A. D. 1875.

A. T. GREEN, Secretary.

STATE OF OREGON, County of Douglas, ss.

On this 7th day of June, 1875, before me, a Notary Public in and for said County, personally appeared J. F. Watson, to me well known to be the identical same person mentioned in and who as Secretary of the Coos Bay Wagon Road Company signed the foregoing instrument to which this certificate is attached and acknowledged that he as Secretary of the Coos Bay Wagon Road Company, pursuant to the order of the Directors and Stockholders of said Company, also herewith attached, freely and voluntarily executed the same for the purposes therein expressed.

In witness whereof, I have hereunto set my hand and Notarial Seal the day and year above written.

L. F. LANE, Notary Public.

EXHIBIT "E."

*Coos Bay Wagon Road Company to William H. Besse.*

This indenture, made the seventh day of January, one thousand eight hundred and eighty-four, between the Coos Bay Wagon Road Company, a corporation duly formed and existing under the laws of the State of Oregon, whose office and prin-

cipal place of business is at the town of Roseburg, County of Douglas, State of Oregon, represented herein by its President, S. Hamilton, thereunto duly authorized by a resolution of the Stockholders passed at a meeting held on the fifth day of January, A. D. 1884, and a resolution of the Board of Directors of said Company passed at a meeting held on the fifth day of January, A. D. 1884, copies of both of which resolutions are hereto attached and made part of this deed, party of the first part, and William H. Besse, of the City of New Bedford, State of Massachusetts, party of the second part,

Witnesseth: That the said party of the first part, for and in consideration of the sum of Ninety-one thousand seven hundred and fifteen and five one hundredths (\$91,715.05) dollars, Gold Coin of the United States of America, to it in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed and confirmed, and by these presents does grant, bargain, sell, convey and confirm unto the said party of the second part and to his assigns forever, all of the following described tracts or parcels of land situate, lying and being in the Counties of Douglas and Coos in the State of Oregon, being a portion of the lands donated to the State of Oregon by the Act of Congress approved March 3rd, 1869, entitled "An Act granting lands to the State of Oregon to aid in the construction of a Military Wagon Road from the nav-

igable waters of Coos Bay in said State," and granted by the Act of the Legislative Assembly of the State of Oregon, approved October 26th, 1870, to the Coos Bay Wagon Road Company.

First: All of the following described tracts and parcels of land situate in Township Twenty-eight South, Range Eight West (T. 28 S., R. 8 W.), of the Willamette Principal Meridian, to-wit: Lots one (1), two (2), three (3), four (4), the South half of the North half and the South half of Section three (3), containing Six hundred and forty-two and 80-100 (642 80-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section five (5), containing Six hundred and thirty-nine and 71-100 (639 71-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the East half of the West half and the East half of Section seven, containing Six hundred and thirty-five and 94-100 (635 94-100) acres, more or less.

All of Section nine (9), containing Six hundred and forty (640) acres, more or less.

All of Section seventeen (17), containing Six hundred and forty (640) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the East half of the West half and the East half of Section nineteen (19), containing Six hundred and forty-three and 94-100 (643 94-100) acres, more or less.

The West half of the Southwest quarter and



the North half of Section twenty-one (21), containing Four hundred (400) acres, more or less.

All of Section twenty-nine (29), containing Six hundred and forty (640) acres, more or less.

Second: All of the following described tracts and parcels of land situate in Township Twenty-eight South, Range Nine West (T. 28 S., R. 9 W.), of the Willamette Principal Meridian, to-wit:

Lots one (1), two (2), three (3), four (4), the South half of the North half and the South half of Section one (1), containing Six hundred and forty-two and 88-100 (642 88-100) acres, more or less.

Lots one (1), two (2), three (3), four (4), the South half of the North half and the South half of Section three (3), containing Six hundred and forty-seven and 36-100 (647 36-100) acres, more or less.

Lots one (1), two (2), three (3), four (4), the South half of the North half and the South half of Section five (5), containing Six hundred and forty-eight and 32-100 (648 32-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the East half of the West half and the East half of Section seven (7), containing Six hundred and sixty-nine and 20-100 (669 20-100) acres, more or less.

All of Section nine (9), containing Six hundred and forty (640) acres, more or less.

All of Section eleven (11), containing Six hundred and forty (640) acres, more or less.

All of Section thirteen (13), containing Six hundred and forty (640) acres, more or less.

All of Section fifteen (15), containing Six hundred and forty (640) acres, more or less.

All of Section seventeen (17), containing Six hundred and forty (640) acres, more or less.

Lots one (1), two (2), three (3), four (4), the East half of the West half and the East half of Section nineteen (19), containing Six hundred and seventy and 40-100 (670 40-100) acres, more or less.

All of Section twenty-one (21), containing Six hundred and forty (640) acres, more or less.

All of Section twenty-three (23), containing Six hundred and forty (640) acres, more or less.

All of Section twenty-five (25), containing Six hundred and forty (640) acres, more or less.

All of Section twenty-seven (27), containing Six hundred and forty (640) acres, more or less.

All of Section twenty-nine (29), containing Six hundred and forty (640) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the East half of the West half and the East half of Section thirty-one (31), containing Six hundred and seventy and 72-100 (670 72-100) acres, more or less.

All of Section thirty-three (33), containing Six hundred and forty (640) acres, more or less.

All of Section thirty-five (35), containing Six hundred and forty (640) acres, more or less.

Third: All the following described tracts and parcels of land situate in Township Twenty-nine

South, Range Nine West (T. 29 S., R. 9 W.), of the Willamette Principal Meridian, to-wit:

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section three (3), containing Six hundred and thirty-eight and 72-100 (638 72-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section five (5), containing Six hundred and twenty-three and 72-100 (623 72-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the East half of the West half and the East half of Section seven (7), containing Six hundred and sixty-eight and 64-100 (668 64-100) acres, more or less.

All of Section nine (9), containing Six hundred and forty (640) acres, more or less.

Fourth: All the following described tracts and parcels of land situate in Township Twenty-eight South, Range Ten West (T. 28 S., R. 10 W.), of the Willamette Principal Meridian, to-wit:

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section one (1), containing Six hundred and thirty-nine and 44-100 (639 44-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section three (3), containing Six hundred and

forty-eight and 26-100 (648 26-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section five (5), containing Six hundred and fifty-seven and 44-100 (657 44-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the East half of the West half and the East half of Section seven (7), containing Seven hundred and eighty-one and 84-100 (781 84-100) acres, more or less.

The East half of the Northeast quarter, the Northwest quarter of the Northeast quarter, the West half of the Southeast quarter and the west half of Section nine (9), containing Five hundred and twenty (520) acres, more or less.

The North half of the Northeast quarter, the East half of the Northwest quarter, the South half of the Southwest quarter and the East half of the Southeast quarter of Section eleven (11), containing Three hundred and twenty (320) acres, more or less.

All of Section thirteen (13), containing Six hundred and forty (640) acres, more or less.

All of Section fifteen (15), containing Six hundred and forty (640) acres, more or less.

All of Section seventeen (17), containing Six hundred and forty (640) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the East half of the West half and the East half



of Section nineteen (19), containing Seven hundred and eighty-two and 08-100 (782 08-100) acres, more or less.

All of Section twenty-one (21), containing Six hundred and forty (640) acres, more or less.

All of Section twenty-three (23), containing Six hundred and forty (640) acres, more or less.

All of Section twenty-five (25), containing Six hundred and forty (640) acres, more or less.

All of Section twenty-seven (27), containing Six hundred and forty (640) acres, more or less.

All of Section twenty-nine (29), containing Six hundred and forty (640) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the East half of the West half and the East half of Section thirty-one (31), containing Seven hundred and seventy-nine and 78-100 (779 78-100) acres, more or less.

All of Section thirty-three (33), containing Six hundred and forty (640) acres, more or less.

All of Section thirty-five (35), containing Six hundred and forty (640) acres, more or less.

Fifth: All the following described tracts and parcels of land situate in Township Twenty-nine South, Range Ten West (T. 29 S., R. 10 W.), of the Willamette Principal Meridian, to-wit:

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section one (1), containing Six hundred and forty-one and 02-100 (641 02-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section three (3), containing Six hundred and forty-three and 62-00 (643 62-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section five (5), containing Six hundred and forty-six and 78-100 (646 78-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the East half of the West half and the East half of Section seven (7), containing Six hundred and forty-one and 76-100 (641 76-100) acres, more or less.

All of Section nine (9), containing Six hundred and forty (640) acres, more or less.

All of Section eleven (11), containing Six hundred and forty (640) acres, more or less.

Sixth: All the following described tracts and parcels of land situate in Township Twenty-seven South, Range Eleven West (T. 27 S., R. 11 W.), of the Willamette Principal Meridian, to-wit:

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section five (5), containing Six hundred and fifty and 66-100 (650 66-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the East half of the West half and the East half of Section seven (7), containing Six hundred and

forty-seven and 20-100 (647 20-100) acres, more or less.

All of Section nine (9), containing Six hundred and forty (640) acres, more or less.

All of Section seventeen (17), containing Six hundred and forty (640) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the East half of the West half and the East half of Section nineteen (19), containing Six hundred and forty-five and 92-100 (645 92-100) acres, more or less.

All of Section twenty-one (21), containing Six hundred and forty (640) acres, more or less.

All of Section twenty-nine (29), containing Six hundred and forty (640) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the East half of the West half and the East half of Section thirty-one (31), containing Six hundred and forty-one and 85-100 (641 85-100) acres, more or less.

All of Section thirty-three (33) (except the West half of the Southwest quarter, and the Southwest quarter of the Northwest quarter of said section), containing Five hundred and twenty (520) acres, more or less.

Seventh: All the following described tracts and parcels of land situate in Township Twenty-eight South, Range Eleven West (T. 28 S., R. 11 W.), of the Willamette Principal Meridian, to-wit:

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half

88 *United States vs. Southern Oregon Company*

of Section one (1), containing Six hundred and thirty-two and 80-100 (632 80-100) acres, more or less.

Lots one (1) and two (2), the South half of the North half and the South half of Section three (3), containing Five hundred and fifty-four (554) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the South half of the North half, and the South half of Section five (5), containing Six hundred and thirty-seven and 82-100 (637 82-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the East half of the West half, and the East half of Section seven (7), containing Six hundred and eight and 38-100 (608 38-100) acres, more or less.

All of Section nine (9), containing Six hundred and forty (640) acres, more or less.

All of Section eleven (11), containing Six hundred and forty (640) acres, more or less.

All of Section thirteen (13), containing Six hundred and forty (640) acres, more or less.

The Southeast quarter, the Southeast quarter of the Northeast quarter and the West half of the Northwest quarter of Section fifteen (15), containing Two hundred and eighty (280) acres, more or less.

All of Section seventeen (17), containing Six hundred and forty (640) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the East half of the West half and the East half



of Section nineteen (19), containing Six hundred and twenty-eight and 80-100 (628 80-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4) and five (5), the North half of the North half, the Southwest quarter of the Northwest quarter, the Northwest quarter of the Southwest quarter and the South half of the Southeast quarter of Section twenty-one (21), containing Four hundred and thirty-five and 38-100 (435 38-100) acres, more or less.

All of Section twenty-three (23), containing Six hundred and forty (640) acres, more or less.

All of Section twenty-five (25), containing Six hundred and forty (640) acres, more or less.

All of Section twenty-seven (27), containing Six hundred and forty (640) acres, more or less.

Lots one (1), two (2), three (3), four (4) and five (5), six (6), seven (7), eight (8), nine (9), ten (10), the Northwest quarter, the West half of the Northeast quarter, the Southeast quarter of the Northeast quarter, the Southwest quarter of the Southeast quarter, and the Northwest quarter of the Southwest quarter of Section twenty-nine (29), containing Six hundred and sixteen and 56-100 (616 56-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the East half of the West half and the East half of Section thirty-one (31), containing Six hundred and thirty-seven and 66-100 (637 66-100) acres, more or less.

All of Section thirty-three (33), containing Six hundred and forty (640) acres, more or less.

All of Section thirty-five (35), containing Six hundred and forty (640) acres, more or less.

Eighth: All the following described tracts and parcels of land situate in Township Twenty-nine South, Range Eleven West (T. 29 S., R. 11 W.), of the Willamette Principal Meridian, to-wit:

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section one (1), containing Six hundred and forty and 90-100 (640 90-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section three (3), containing Six hundred and thirty-seven and 22-100 (637 22-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section five (5), containing Six hundred and thirty-two and 32-100 (632 32-100) acres, more or less.

Ninth: All the following described tracts and parcels of land situate in Township Twenty-five South, Range Twelve West (T. 25 S., R. 12 W.), of the Willamette Principal Meridian, to-wit:

The East half of Section thirty-three (33), containing Three hundred and twenty (320) acres, more or less.

Tenth: All the following described tracts and parcels of land situate in Township Twenty-six

South, Range Twelve West (T. 26 S., R. 12 W.), of the Willamette Principal Meridian, to-wit:

The East half of the West half of Section seven (7), containing One hundred and sixty (160) acres, more or less.

Eleventh: All the following described tracts and parcels of land situate in Township Twenty-eight South, Range Twelve West (T. 28 S., R. 12 W.), of the Willamette Principal Meridian, to-wit:

Lots one (1), two (2), three (3) and four (4) the South half of the North half and the Southeast quarter of Section one (1), containing Five hundred and eleven and 46-100 (511 46-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section three (3), containing Six hundred and seventy-three and 60-100 (673 60-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section five (5), containing Six hundred and fifty-three and 41-100 (653 41-100) acres, more or less.

All of Section nine (9), containing Six hundred and forty (640) acres, more or less.

The Southeast quarter, the Northwest quarter, the North half of the Southwest quarter, the South half of the Northeast quarter and the Northwest quarter of the Northeast quarter of Section eleven

(11), containing Five hundred and twenty (520) acres, more or less.

Lots one (1), two (2) and three (3), the North-east quarter, the South half of the Northwest quarter and the South half of Section thirteen (13), containing Six hundred and thirty-five and 02-100 (635 02-100) acres, more or less.

Lots one (1), two (2), three (3), four (4), eight (8) and nine (9), the Northwest quarter and the Southwest quarter of the Southwest quarter of Section fifteen (15), containing Three hundred and seventy and 30-100 (370 30-100) acres, more or less.

All of Section seventeen (17), containing Six hundred and forty (640) acres, more or less.

The North half of the Southwest quarter, the North half of the Southeast quarter, the Southwest quarter of the Southwest quarter, the Southeast quarter of the Southeast quarter and the North half of Section twenty-one (21), containing Five hundred and sixty (560) acres, more or less. .

Lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8) and nine (9), the North half of the North half, the South half of the Southwest quarter, and the Southeast quarter of Section twenty-three (23), containing Six hundred and nineteen and 08-100 (619 08-100) acres, more or less.

Lots one (1), two (2), three (3), six (6), seven (7), eight (8) and nine (9), the West half of the Northwest quarter, the Northeast quarter of the Northeast quarter, the Southeast quarter of the



Southeast quarter and the Southeast quarter of the Southwest quarter of Section twenty-five (25), containing Four hundred and fourteen and 34-100 (414 34-100) acres, more or less.

Lots one (1), two (2), three (3) and four (4), the South half of the North half and the South half of Section twenty-seven (27), containing Six hundred and thirty-five and 04-100 (635 04-100) acres, more or less.

The Southeast quarter, the East half of the Southwest quarter and the North half of Section twenty-nine (29), containing Five hundred and sixty (560) acres, more or less.

The East half of the Southeast quarter, the North half of the Northeast quarter, and the Northeast quarter of the Northwest quarter of Section seven (7), containing Two hundred (200) acres, more or less.

The West half of the Northeast quarter, the Northwest quarter of the Southeast quarter and the Southeast quarter of the Southeast quarter of Section nineteen (19), containing One hundred and sixty (160) acres, more or less.

Twelfth: All the following described tracts and parcels of land situate in Township Twenty-seven South, Range Twelve West (T. 27 S., R. 12 W.), of the Willamette Principal Meridian, to-wit:

The Northwest quarter of the Southwest quarter of Section twenty-five (25), containing Forty (40) acres, more or less. Being in all Sixty-one thousand one hundred and forty-three and 37-100

(61,143 37-100) acres, more or less. Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in law as in equity of the said party of the first part of, in or to the above described premises and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever. And the party of the first part hereby covenants to and with the party of the second part, his heirs and assigns, that said party of the first part is the owner in fee simple of said above described premises and that they are free from all incumbrances and that said party of the first part will warrant and defend the same from all lawful claims whatsoever.

In witness whereof, the said party of the first part hath caused these presents to be signed by its President and the official seal of the Corporation to be affixed the day and year first above written.  
THE COOS BAY WAGON ROAD COMPANY,

By S. HAMILTON, President.

In presence of:

S. F. CHADWICK,

E. B. CLEMENT.

Attest:

(Seal.)

J. F. WATSON, Secretary.

STATE OF OREGON, County of Douglas, ss.

On this 7th day of January, A. D. 1884, before me, a Notary Public of the State of Oregon in and for the County of Douglas, at my office at Roseburg in said County and State, personally appeared S. Hamilton, whose name appears signed to the foregoing conveyance as President of the Coos Bay Wagon Road Company, well known to me to be the President of the Coos Bay Wagon Road Company and the identical same S. Hamilton, who, as President of said Company, signed said conveyance and acknowledged that he executed the same as President of said Company pursuant to authority conferred upon him by the resolutions of the Stockholders and Directors of said Company to said conveyance attached. At the same time and place, before me personally appeared J. F. Watson, to me well known to be the Secretary of said Company and the identical same J. F. Watson, who, as Secretary of said Company, signed the foregoing conveyance and acknowledged that he signed and attested the same as Secretary of the Coos Bay Wagon Road Company and affixed thereto the Corporate Seal of said Company by the order and direction of the Stockholders and Directors of said Company, and that he is and was at the date of affixing said Corporate Seal the lawful custodian thereof and that the seal so affixed is the genuine seal of the Coos Bay Wagon Road Company.

In witness whereof, I have hereunto set my hand

and official seal the day and year first above written.

(Seal.)

J. C. FULLERTON,  
Notary Public for Oregon.

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Office of the Coos Bay Wagon Road Company,  
Roseburg.

At a meeting of the Stockholders of the Coos Bay Wagon Road Company, held on this fifth day of January, A. D. 1884, each member present was found on examination to be credited on the books of the Company with the number of shares of the capital stock set opposite their respective names below:

S. Hamilton .....	95	Shares
D. L. Watson (by S. Hamilton, proxy) ..	15	"
Aaron Rose .....	60	"
A. R. Flint.....	95	"
J. F. Watson.....	30	"
A. T. Green (by J. F. Watson, proxy) ..	30	"
S. C. Flint.....	5	"
J. W. Hamilton.....	5	"
T. J. Beale (by S. Hamilton, proxy) ....	60	"

Total number of shares represented, four hundred (400) shares.

The following preamble and resolution were offered by Mr. J. F. Watson:

Whereas, it is deemed and considered to be to the best interests of this Company that a sale and conveyance should be made of its land and prem-



ises situate, lying and being in the Counties of Coos and Douglas, State of Oregon, patented and to be patented, to which this Corporation is entitled or in which it has or may acquire any interest by virtue of certain laws of the United States and the State of Oregon, namely, Act of Congress approved March 3rd, 1869, entitled "An Act granting lands to the State of Oregon, etc.," and an Act of the Legislative Assembly of the State of Oregon approved October 26th, 1870, excepting such portions as have already been conveyed or bonded; therefore, be it

Resolved, that the President of this Company be and he is hereby authorized and empowered for and on behalf of the Company, and in its name, and as its act and deed, to negotiate such sale, for such consideration and on such terms as he shall deem proper. And for and on behalf of this Company, and in its name and as its act and deed, to make, execute, seal with the Corporate Seal, acknowledge and deliver any and all instruments in writing for the transfer and conveyance of said property; and be it further

Resolved, that the Directors of this Corporation be and they are hereby empowered to authorize to be executed and delivered, by the proper officers of this Corporation, all deeds and writings for the carrying out of the powers by this resolution given.

Mr. Aaron Rose having seconded the above pre-

amble and resolution, the same were adopted by unanimous vote.

I, J. F. Watson, Secretary of the meeting of the Stockholders of the Coos Bay Wagon Road Company, held at the office of the Company at Roseburg on the fifth day of January, A. D. 1884, do hereby certify and declare the above to be a correct abstract from the records of the said meeting and a true and correct copy of a preamble and resolution passed and adopted at said meeting.

Witness my hand and seal this seventh day of January, A. D. 1884, at Roseburg, Oregon.

(Seal.)

J. F. WATSON, Secretary.

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Office of the Coos Bay Wagon Road Company,  
Roseburg.

At a meeting of the Board of Directors of the Coos Bay Wagon Road Company, held at their office on the fifth day of January, A. D. 1884, there were present: Messrs. S. Hamilton, A. R. Flint, Aaron Rose and J. W. Hamilton. The following preamble and resolution were presented by Mr. J. F. Watson:

Whereas, it is deemed and considered to be to the best interests of the Coos Bay Wagon Road Company that a sale and conveyance should be made of its land and premises situate, lying and being in the Counties of Coos and Douglas, State of Oregon, patented and to be patented, to which this Corporation is entitled or in which it has or

may acquire any interest by virtue of certain laws of the United States and the State of Oregon, namely, Act of Congress approved March 3rd, 1869, entitled "An Act granting lands to the State of Oregon, etc.," and an Act of the Legislative Assembly of the State of Oregon approved October 26th, 1870, excepting such portions as have already been conveyed or bonded; therefore, be it

Resolved, that the President of this Company be and he is hereby authorized and empowered, for and on behalf of this Company, and in its name and as its act and deed, to negotiate such sale for such consideration and on such terms as he shall deem proper, and for and on behalf of this Company, and in its name and as its act and deed, to make, execute, seal with the Corporate Seal, acknowledge and deliver any and all instruments in writing for the transfer and conveyance of said property.

This resolution being adopted in aid of an authorization heretofore given, and resolution duly adopted by the Stockholders of this Company at their meeting held at the office of the Company in Roseburg on the fifth day of January, A. D. 1884.

The preamble and resolution having been seconded by Mr. A. R. Flint, were unanimously adopted.

I, J. F. Watson, Secretary of the Coos Bay Wagon Road Company, do hereby certify and declare the above to be a correct transcript from the records of a meeting of the Board of Directors of

said Company held at the office of the Company at Roseburg on the fifth day of January, A. D. 1884, and a true and correct copy of a preamble and resolution passed and adopted by unanimous vote at said meeting.

In witness whereof, I have hereunto set my hand as Secretary and affixed the Corporate Seal of this Company this seventh day of January, A. D. 1884.

(Seal.) J. F. WATSON,  
Secretary of the Coos Bay Wagon Road Company.

STATE OF OREGON, County of Douglas, ss.

On this 7th day of January, A. D. 1884, before me, J. C. Fullerton, a Notary Public of the State of Oregon in and for the County of Douglas, at my office at Roseburg, personally appeared J. F. Watson, to me well known to be the identical J. F. Watson whose name appears subscribed above as Secretary of the Stockholders' meeting held January 5th, 1884, by the Stockholders of the Coos Bay Wagon Road Company, and as Secretary of the meeting of the Directors of said Company, held on the same date, and who, being duly sworn, does certify and declare that he acted as Secretary of the meeting of the Stockholders of the Coos Bay Wagon Road Company, held on January 5th, 1884, and that he was and is the Secretary of the Coos Bay Wagon Road Company, and as such Secretary he kept the minutes of the meeting of the Stockholders on said January 5th, 1884, and also the



minutes of the meeting of the Board of Directors of said Company, held on the same date, and that the above and foregoing purporting to be copies of portions of the minutes of said meetings as the same were kept by him and as the same were entered upon the record book of said Corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

(Seal.)

J. C. FULLERTON,  
Notary Public for Oregon.

### EXHIBIT "F."

This indenture, made this first day of January, in the year of our Lord one thousand eight hundred and eighty-four, by and between the Oregon Southern Improvement Company, a corporation established under the laws of the State of Oregon, and the Boston Safe Deposit and Trust Company, a corporation established under the laws of the Commonwealth of Massachusetts,

Witnesseth: That whereas, the said Improvement Company is by its Articles of Incorporation and the laws of the State of Oregon authorized and empowered:

1. To purchase, acquire, rent, hold, drain, improve, cultivate, lease, mortgage, sell, convey and dispose of improved and unimproved land and town and city lots and property in the States of Oregon and California, in the Territories of Washington and Idaho and in British Columbia;

2. To erect, construct and maintain upon its own property or leased property, wherever situated, drydocks, docks, locks, piers, wharves, bridges, elevators, depot buildings, coal and ore bunkers, station houses, warehouses, roundhouses machine shops, factories, mills, dwellings, houses and offices and buildings and superstructures for every other lawful purpose, and to lease, mortgage, sell, convey and dispose of the same;

3. To build, construct and maintain in repair streets and roads, railroads and street railroads adjacent to or leading to or from its property;

4. To construct, operate and maintain a railroad bridge, or a railroad and wagon road bridge, or both, across any river or stream of water, on the line of the proposed railroad, and to collect and receive tolls for the passage of railroad trains and cars, goods, wares and merchandise, teams and wagons and other vehicles, livestock and foot passengers over the same;

5. To construct and equip one or more railroads and telegraph lines from the waters of Coos Bay, in Coos County, Oregon, to the eastern boundary in the State of Oregon, by way of Roseburg, in Douglas County, Oregon, with as many main tracks and telegraph lines as may be found necessary or convenient to accommodate the business of the Oregon Southern Improvement Company of Oregon, with all necessary or convenient side-tracks, switches, inclines and appurtenances and to maintain and operate the same and carry freight and passengers

thereon and receive tolls therefor, and to lease, mortgage, sell and dispose of the same or any portion thereof;

6. To contract for the construction and equipment and to construct and equip railroad and telegraph lines, military roads, canals, docks, locks, bridges, piers, wharves and other public works, and to receive payment therefor in cash or in stock, shares, bonds or other securities, and to maintain and operate such railroads and other works during construction and until completion and transfer thereof to the contracting company, and to carry freight and passengers thereon and receive tolls for the same;

7. To lease and operate and maintain on such terms as may be agreed upon any railroad or railroads, with its or their rolling stock, equipments and appurtenances, or any military road, steamship or steamboat line, canal, docks, locks, piers, wharves, bridge or other public work.

8. To promote or facilitate and assist the construction, building, extension of equipment or operation of any railroad line, steamship line or steamboat line, and the formation of any companies for such purposes, or for mining or working coal or iron, and for the improvement of real estate, and for such purposes to subscribe for or purchase the franchise, stocks or bonds of any such company or to guarantee or otherwise secure the payment of any such bonds, or the interest thereon, or the payment of dividends on any such stocks or

pledge or mortgage of the property or any part thereof, or otherwise;

9. To build, purchase and own, hire, lease and run steamships between the ports of Coos Bay, Astoria, Portland, Seattle, Victoria, Sitka, San Francisco, or any port in the North Pacific Ocean, and steamboats in the Coquille River and Coos Bay and its tributaries, in Oregon;

10. To purchase or acquire land or lots, whether adjacent or contiguous to the railroads, docks, dry-docks, or warehouses, or other property of the company, and to hold, possess, improve, lease, sell, mortgage or otherwise dispose of the same. To purchase, sell, lease or make timber lands or lands, coal mines, sawmills, or mills, lumber and work and operate said timber lands, mines and mills;

11. To purchase railroads, their franchises, rights of way, rolling stock and property, real and personal, thereto belonging or possessed by them. To buy and sell stocks, bonds and shares, lend money on any real or personal security, negotiate loans, and transact any other business usually transacted by a credit or finance company;

12. To borrow money on bonds, notes, indentures or otherwise, and to mortgage any of the property, real or personal, of this corporation to secure payment of the same;

13. To loan money upon personal or real estate security and to take mortgage upon real and personal property to secure loans made by it;

14. To obtain the necessary charters or other



authorization, and to do all acts necessary to enable the company to carry on business in any part of the United States and in the Dominion of Canada.

And lastly, generally to do and perform everything necessary, proper or convenient to carry into effect the objects aforesaid.

And whereas, the said Improvement Company has already acquired certain property, real and personal, for the purposes set forth in its said Articles of Incorporation, the said real property hitherto acquired all lying within the Counties of Coos and Douglas, in the State of Oregon, and proposes from time to time hereafter to acquire other property for the said purposes in the said counties and elsewhere; and

Whereas, the said Improvement Company, for the better effecting of the purposes of its incorporation as aforesaid has resolved to issue bonds to an amount not exceeding two million dollars, said bonds to bear even date with these presents and to be made payable on the first day of January in the year One thousand nine hundred and fourteen, with interest from and after their date at the rate of six per centum per annum, payable semi-annually on the first days of July and January in each year, both principal and interest being payable as the same accrue in lawful money of the United States of America at the office of the said Trust Company in the City of Boston in said Commonwealth of Massachusetts or at such other place

or places as the Directors of the said Improvement Company may designate, and to be issued from time to time at the discretion of the said Directors in the form of bonds for One thousand dollars each, with coupons attached for the interest as aforesaid, such coupons being in all cases payable to bearer, but the bonds being subject from time to time to registration; the said bonds being entitled to the benefit of the annual sinking fund hereinafter provided for and subject to be drawn for redemption by such sinking fund and being convertible by the holder thereof into an equal amount of the capital stock of the said Improvement Company at par on presentation at the office of the said Improvement Company in Boston on the first day of January in any year before the year 1900, provided that 30 days' previous notice in writing of such presentation shall have been given to the said Improvement Company; and

Whereas, the said Improvement Company has resolved to secure the punctual payment of said bonds and the interest on the same by mortgages or deeds of trust conveying and assuring to the said Trust Company all its corporate property and franchises of every nature and kind now owned or hereafter to be acquired in trust for the benefit and security of the holders of said bonds and of each of said bonds equally and indifferently, notwithstanding the same may be issued or sold at different times; and likewise to provide for the gradual withdrawal of said bonds by means of an

annual sinking fund as hereinafter provided; and

Whereas, it is intended by the present indenture to convey, assign and mortgage all of the personal property of the said Improvement Company now owned, or hereafter to be acquired, and all of its real property in Coos County, in the State of Oregon, now owned or hereafter to be acquired; and

Whereas, the said Improvement Company has executed a supplemental mortgage or deed of trust of even date herewith, conveying all its real estate now owned or hereafter to be acquired in said Douglas County, and has agreed from time to time, as it may acquire other real estate in other counties in the State of Oregon, or in other states, territories or countries named in its Articles of Incorporation, to execute further supplemental mortgages or deeds of trust conveying all its real property in such other counties, states, territories or countries as more fully appears in the covenants hereinafter containing; and

Whereas, the said Trust Company has accepted and taken upon itself the said trust upon the terms and conditions hereinafter set forth and has agreed as trustee to certify in writing upon each bond so to be issued as aforesaid that the same is secured by said mortgages or deeds of trust without which certificate no bond is to be deemed to be so issued or secured;

Now therefore, the said Oregon Southern Improvement Company in consideration of the premises and in order to secure the due and punctual

payment of the principal and interest of said bonds issued and to be issued as the same shall become payable according to the tenor of said bonds and of the coupons thereto annexed, doth by these presents sell, transfer and assign unto the said Boston Safe Deposit and Trust Company all the personal property now owned or hereafter to be acquired by said Improvement Company, however described and wheresoever it may at any time be, that is to say, all goods, chattels and rights in possession or in action, and doth also by these presents grant, bargain, sell and convey all of the lands, tenements and hereditaments now owned or hereafter to be acquired by the said Improvement Company in Coos County, in the State of Oregon, and all property and rights appertaining thereto, including all ships, vessels, boats, water crafts of all kinds, propelled by steam or otherwise, and their tackle, apparel, furniture, stores and appurtenances whatsoever now owned or hereafter to be acquired by said Improvement Company, and all freight, tolls and income thereof. And also all franchises, shares, bonds and obligations of any other corporation now owned or hereafter to be acquired by said Improvement Company, with all dividends, interests, incomes and rights thereunto belonging, and all contracts with and claims and demands of every nature against any national or state government, or any county, municipal or private corporation, or any person or persons whatsoever. And also all goods, chattels, rights in possession or in action



and personal property of every description now owned or hereafter to be owned by said Improvement Company and in anywise relating or pertaining to or connected with its business or used for conducting the same. And including also all improved or unimproved lands in said Coos County, with all timber, mines, minerals, edifices and fixtures on, in, about or pertaining to the same, and all land contracts, timber, pasture, mining or water rights now owned or hereafter to be acquired by said Improvement Company in said Coos County, with all rents, issues, profits, benefits and advantages that can or may be had or taken of, from or out of the same. And also all houses, mills, warehouses, piers, wharves, bridges, docks, canals, locks, buildings and superstructures of whatsoever kind and wherever situated in said Coos County, now constructed or owned or hereafter to be constructed or owned by said Improvement Company, on its own or leased property, with all easements, privileges and appurtenances on the same belonging, and all rents, issues and profits thereof. And also all streets and street railroads, turnpikes, ways and rights of way, bridges, tunnels and ferries in said Coos County now owned or hereafter to be acquired, together with all property, real or personal, pertaining or relating to the same, and easements and privileges to the same belonging. Also all railroads and telegraph lines in said Coos County, constructed or to be constructed, on or over the lines or routes or any of them in the Articles

of Incorporation of said Improvement Company mentioned, with all and singular railroads, telegraphs, roadbeds, buildings and superstructures and all kinds of rolling stock, and all ways, rights of way and lands acquired or appropriated or to be acquired or appropriated for rights of way, with all franchises, easements, rights, privileges and immunities now or hereafter pertaining to said railroads and telegraphs or the appurtenances or appendages thereof, and all property, real or personal, now owned or hereafter to be acquired by said Improvement Company for the purposes of the construction, equipment, maintenance or operation of the said railroads and telegraphs. Together with all rents, issues, profits, moneys, emoluments, benefits and advantages whatsoever that can or may be had, taken or enjoyed from and out of all and singular the premises in as full and ample a manner as the same now are or hereafter may be possessed and enjoyed by the said Improvement Company.

To have and to hold all and singular the premises hereinbefore and hereby granted, mortgaged, pledged and conveyed and every part and parcel thereof, with all the appurtenances in anywise thereunto belonging and appertaining to the said Boston Safe Deposit and Trust Company, its successors and assigns, to its and their own use and behoof forever. But upon trust, nevertheless, to and for the uses and purposes and upon the conditions hereinafter set forth:

First: These presents are upon the express condition that upon the payment of the principal and interest of all said bonds according to their tenor, then these presents and the estate hereby granted shall cease, determine and be void, and all the property and rights herein granted shall revert to and revest indefeasibly in the said Improvement Company, its successors and assigns, without any acknowledgment of satisfaction, reconveyance, re-entry or other act.

Second: Until default shall be made by said Improvement Company, either in the payment of the principal or interest of said bonds or any of them, or providing for the annual sinking fund hereafter described, or in keeping and observing any of its covenants and agreements herein contained, the said Improvement Company and its successors and assigns shall remain in the quiet and peaceable possession of the granted premises and every part and parcel thereof, and shall be permitted and suffered to take and enjoy the tolls, rents, income, profits, benefits and advantages of the same, including all timber, mining and water rights, in the same manner and with the same effect as if these presents had not been made.

Third: Until default as aforesaid the said Improvement Company may unless the said Trust Company prohibit it from so doing from time to time cut and carry away any and all timber growing upon any of its lands and dig and carry away any coal, iron or other minerals that may be found in or upon

any of the said lands and may sell and dispose of such timber, coal and minerals. The proceeds of any such sale or disposition shall be applied so far as necessary in any year to the maintenance of the annual sinking fund hereinafter described, any surplus therefrom in any year after providing as aforesaid for the said sinking fund being applied by the said Improvement Company for its own uses and purposes at the discretion of its directors. And until default as aforesaid the said Improvement Company may at any time with the consent of the said Trust Company sell, exchange or otherwise dispose of any other part of its property, real or personal, free and discharged of the lien of this mortgage and of any and all mortgages supplemental hereto and may reinvest the proceeds of such sale or disposition, provided always that such proceeds and substituted property shall be at all times covered by and subject to this mortgage or the said mortgages supplemental hereto. The said Trust Company shall and will execute all deeds, releases, bills of sale and conveyances necessary or proper to carry into effect its consent as aforesaid and all such instruments may be executed on behalf of the said Trust Company by its attorney or attorneys thereunto duly authorized and empowered.

Fourth: In case the said Improvement Company shall fail to pay the principal or any part thereof, or any instalment of interest, or any part thereof, of any of the bonds secured or intended to be secured hereby, when and where the same shall become



due and payable according to the tenor and effect thereof, and for sixty days thereafter, or shall fail after sixty days' notice to provide for the annual sinking fund hereinafter described, or shall fail to pay and discharge within a reasonable time all taxes, charges, rates, levies and assessments which have been or may hereafter be imposed, assessed or levied upon the mortgaged premises, franchises or property, or shall fail, after sixty days' notice from said Trust Company, to keep said property in reasonable repair and condition,—then, and in any such case, the said Trust Company may, at its discretion, unless compelled to do so by a majority in interest, of the holders of said bonds as hereinafter provided, enter upon and take possession of all and singular the said mortgaged premises, franchises and property herein mentioned or described, and by itself or its agents duly constituted, have, use and employ the said property, and the appurtenances thereto belonging and proper for its use, making from time to time all repairs, alterations and additions thereto by the said Trust Company deemed needful, and paying all taxes due upon the same, and after deducting the expenses of all such repairs, alterations, additions and taxes, and all sums necessary for its indemnification and reasonable compensation, apply the net income of the said premises and property to the payment pro rata of the interest and principal of all of said bonds from time to time due and unpaid, or may procure the appointment of a receiver and the application of the net income as aforesaid.

Fifth: And in case of any default, as aforesaid, and continuation thereof as aforesaid for sixty days, the said Trust Company may, at its discretion unless compelled to do so by a majority in interest of the holders of said bonds as hereinafter provided, cause the said premises, franchises and property to be sold at public auction, either at Boston in the Commonwealth of Massachusetts, or at Empire City, in the State of Oregon, giving notice of the time, place and terms of said sale by publishing the same in some principal newspaper in each of the cities of Boston, in the Commonwealth of Massachusetts, and Empire City and Portland, in the State of Oregon, at least once a week for three successive weeks, the last publication to be at least thirty days before the time appointed for said sale; with power to adjourn said sale from time to time at its discretion and to sell the granted premises, franchises and property either as a whole or in such parcels as to said Trust Company may seem most beneficial but at one and the same time and such sale in its own name or as attorney of said Improvement Company thereunto by these presents duly appointed and constituted to execute to the purchaser or purchasers thereat good and sufficient conveyances, deeds, bills of sale, assignments and transfers of all and singular the said property, rights and premises hereby granted, assigned, transferred or conveyed as aforesaid, which sale so to be made as aforesaid and which conveyances, deeds, bills of sale, assignments, transfers so to be executed as aforesaid shall operate to convey,

assign, transfer and vest in said purchaser or purchasers all the right, title, estate and interest whatsoever reversionary or otherwise of said Improvement Company and which said sale so to be made shall be a complete and perpetual bar at law and in equity against said Improvement Company, its successors and assigns, and all persons claiming under it or them, of all right, interest, or claim in or to said premises, franchises, and property, or any part thereof. In case of such sale, no purchaser other than the said Trust Company shall be responsible for the application of the purchase money. And the said Trust Company shall, after deducting from the proceeds of the said sale the costs and expenses thereof and any costs and expenses it may have incurred in or about the execution of this trust, and enough to indemnify and save itself harmless from all liabilities arising from this trust, and its reasonable compensation, apply so much of the proceeds of the said premises, franchises and property as may be necessary to the payment pro rata of the interest of said bonds unpaid and of the principal *whither* then or thereafter payable, and shall pay the residue of said proceeds, if there be any, to said Improvement Company, its successors or assigns. And at any such sale, the said Trust Company may in its discretion in behalf of the holders of said bonds then outstanding bid for and purchase the premises, franchises and property so sold, at a price which together with the price or prices paid for all other property now or hereafter by supplemental inden-

tures included in this trust and so sold on default shall not exceed the whole amount due on said bonds then outstanding with interest accrued thereon together with the proper costs and charges of the said Trust Company and the expenses of the sale.

Sixth: In case of default in the payment of interest of any of said bonds, which default shall continue for sixty days, then the principal of all said bonds shall, if said Trust Company shall so elect, upon written notice by said Trust Company to said Improvement Company, become and be at once due and payable and shall be so held and deemed for the purposes of foreclosure and sale in either of the methods herein provided and for all other purposes whatsoever.

Seventh: In case of any default in payment of the interest or principal of said bonds, and continuation thereof as aforesaid, a majority in *in* interest of the holders of the said bonds then outstanding by an instrument in writing signed by them, and on their furnishing to the said Trust Company reasonable means and indemnity for the payment of services, expenses and liabilities to be performed and incurred in so doing, may compel the said Trust Company to enforce either of the remedies by foreclosure or sale above provided in case of such default.

Eighth: In case of any default as aforesaid, a foreclosure by entry and taking possession as hereinbefore provided shall not be held to waive the remedy by sale as also hereinbefore provided, but said



power of sale may be exercised by said Trust Company at any time while such possession under such entry continues upon compliance with the terms above provided in regard to the manner, place and notice of such sale. The said provisions hereinbefore contained in regard to foreclosure by entry and possession or by sale shall not be deemed to exclude any other remedy at law or in equity to enforce this mortgage; but said Trust Company may in any case avail itself of such other remedy, and shall be entitled to the appointment of a receiver and to the specific performance of any of the covenants herein contained.

Ninth: It is understood and agreed that in no case shall any claim be made under or any advantage taken of any valuation, appraisement, redemption or extension laws by said Improvement Company, its successors or assigns, to prevent such entry, sale, and conveyance as aforesaid, or any foreclosure under this mortgage.

Tenth: The said Improvement Company shall at a reasonable time before the first day of January in the year 1887, and at the like time in each year thereafter during the existence of this trust deposit with the said Trust Company an annual sinking fund which shall purchase and redeem said bonds to the extent of two per centum of the amount of said bonds in that outstanding, which proportion to be annually so redeemed may after the expiration of ten years from the date of this indenture be increased in any year at the option of the Directors of the said Im-

provement Company. Said annual sinking fund shall be deposited either in cash or wholly or in part in the said bonds hereby secured which shall have been purchased by the said Improvement Company during the year preceding such first day of January in each year. Said bonds shall when so deposited be forthwith cancelled under the supervision of said Trust Company. If the whole or any part of the said sinking fund in any year shall have been deposited in cash and not in bonds so purchased as aforesaid, then the said Trust Company shall on the first day of January in a fair and just manner in the presence of a Notary Public draw and designate by lot a sufficient number of said bonds to make up the required amount and the said Trust Company shall thereupon by an advertisement published at least twice a week for three successive weeks in one or more daily newspapers in Boston notify the holders of the bonds so drawn to present their bonds for payment at par and accrued interest on or before the next coupon day, and from said last named day all interest upon said bonds so drawn shall cease. Said bonds so drawn shall be so paid and redeemed when duly presented at the office of said Trust Company in Boston the money therefor being supplied from said sinking fund, which the said Improvement Company hereby agrees to make sufficient for said purpose. All bonds so redeemed and the coupons thereof shall be forthwith cancelled under the supervision of the said Trust Company. The proceeds of any sale or disposition by the said Improvement Com-

pany of timber, coal or minerals from its lands in any year shall as hereinbefore provided be applied to the maintenance of the sinking fund for that year either directly in cash or in the purchase of bonds to be deposited as aforesaid. Any surplus from said proceeds in any year after such provision for said sinking fund for that year shall have been fully made shall be retained as aforesaid by the said Improvement Company for its own uses and purposes, and in case said proceeds in any year shall not be sufficient to provide for said sinking fund the said Improvement Company shall make good the deficiency.

Eleventh: The compensation and all reasonable expenses of said Trust Company in discharge of the trust and as agent for the payment of said bonds and interest shall be paid by the said Improvement Company as they are incurred, or otherwise, out of the trust estate, on which they are hereby made a charge. It is further agreed that in no case shall the said Trust Company be required to act hereunder for the enforcement of the several provisions hereof until it is furnished with sufficient funds for the purpose, or is suitably indemnified; and, further, that for the conduct or omission of any counsel, agent or attorney employed by it in the execution of this Trust, said Trust Company shall not be responsible; if the same shall have been selected by it in good faith, and that said Trust Company shall only be accountable for wilful default or misconduct of itself, its officers, or servants in the management of said trust

or for any negligence in regard to its or their payment of any of said bonds or any coupon of interest thereof or in regard to the purchase or redemption of any of said bonds by the said annual sinking fund. The said Trust Company shall not be held responsible for or on account of any sale, exchange or other disposition of property by the said Improvement Company as hereinbefore permitted whither the same shall have been made with or without the consent of the said Trust Company, or for the application by the said Improvement Company of the proceeds of any such sale or disposition.

Twelfth: The holders of a majority of the bonds hereby secured and outstanding may at any time with the consent of said Improvement Company by an instrument in writing under their hands and seals remove the then Trustee of this mortgage and appoint one or more Trustees thereof in the room of the removed Trustee, but this provision shall not prejudice the right of a minority in interest of the holders of said bonds to apply at any time to a court of competent jurisdiction to remove for cause any trustee hereunder and appoint in lieu thereof such new Trustee or Trustees as to such court shall seem meet. Any Trustee hereunder may resign and discharge itself or himself of and from the trust hereby created, by notice in writing to the said Improvement Company three months before such resignation shall take effect, or such shorter time as the Improvement Company may accept as adequate notice, and upon the due execution and delivery of such convey-



ances to its or his successor as the said Improvement Company shall require in order to transfer the trust. In case of the resignation, dissolution or death of any Trustee under this deed of trust, a new Trustee or Trustees shall be temporarily appointed by said Improvement Company by an instrument in writing under its seal, and notice thereof given by advertisement. And the said Improvement Company shall thereupon apply to the Supreme Judicial Court of Massachusetts, or other court of competent jurisdiction, to confirm its said appointment or to appoint instead as Trustee or Trustees such other corporation or persons as to such court shall seem meet. Upon the resignation, removal, dissolution or death as aforesaid of any Trustee under this deed of trust, all its powers and authority shall cease; but said Trustee, his or its heirs or successors shall on demand execute a deed or deeds of conveyance, to vest in the Trustee appointed in its or his place, and upon the trusts herein expressed, all the property and rights which may be at the time held upon said trusts. Every new trustee or body of trustees appointed under the provisions of this indenture shall be vested with, enjoy, have and exercise all the estate, powers, rights, authority and privileges hereby granted to and conferred on the said Boston Safe Deposit and Trust Company and shall be subject to all duties and liabilities hereby assumed by said Trust Company. And this indenture further witnesseth: That the said Improvement Company doth hereby for itself and its successors covenant with

the said Trust Company and its successors to pay the principal and interest of all of said bonds according to the tenor thereof and all taxes, charges, rates, levies and assessments laid or to be laid upon all the property and franchises of the said Improvement Company to keep its said property in reasonable repair and condition and to execute and deliver any further reasonable or necessary conveyances of said premises, franchises and property or any part thereof whither now owned or hereafter to be acquired to the said Trust Company and its successors which may be required for the more fully assuring and conveying said premises, franchises and property and carrying into effect the objects and purposes of these presents and to do at its own expense all things necessary and proper to be done in order to make and keep valid and intact this trust and mortgage upon the aforesaid premises, franchises and property. And the said Improvement Company doth hereby for itself, and its successors further covenant with the said Trust Company and its successors that in addition to the supplemental mortgage or deed of trust of even date herewith called supplemental mortgage No. 1, by which it has conveyed to the said Trust Company all its real property now owned or hereafter to be acquired in said Douglas County in the State of Oregon it will hereafter from time when it shall acquire any real estate in any County in the State of Oregon other than said Coos and Douglas Counties or in any other State, territory or country named in its articles of incorporation thereupon exe-

cute further, sufficient, supplemental mortgages or deeds of trust in a form satisfactory to the said Trust Company conveying to the said Trust Company all its real property then owned or thereafter to be acquired in such other county, state or country to be held upon the trusts and subject to the terms, covenants and conditions of the indenture.

And this indenture further witnesseth, that the said Boston Safe Deposit and Trust Company hereby accepts the trust conferred upon it by these presents upon the terms and conditions hereinbefore set forth and covenants with the said Improvement Company that on being furnished with funds for the purpose by the said Improvement Company it will pay the said bonds and interest as they severally mature and will receive and apply the said annual sinking fund in the manner hereinbefore provided. And the said Trust Company hereby declares that it does and will hold all the property hereby conveyed and assigned and all the property which has been or shall hereafter be conveyed to it by the said supplemental mortgages or deeds of trust hereinbefore described upon the trusts and subject to the terms and conditions in this indenture set forth.

In witness whereof, the parties have caused their respective corporate seals to be affixed to these presents as also to a counterpart hereof and the same to be signed by their respective Presidents and attested

by their respective Assistant Secretary and Secretary the day and year above written.

THE OREGON SOUTHERN IMPROVEMENT  
COMPANY,  
(Seal)

By WM. H. BESSE, President.

Attest:

WM. ROTCH, Assistant Secretary.

BOSTON SAFE DEPOSITE AND TRUST COM-  
PANY,  
(Seal)

By F. M. STONE, President.

Attest:

EDWARD BOND, Secretary.

Executed by the said Besse, Rotch, Stone and  
Bond in presence of—

HENRY W. SWIFT,  
CHAS. HALL ADAMS.

COMMONWEALTH OF MASSACHUSETTS, Suf-  
folk, ss.

On this 8th day of March, 1884, before me,  
Charles Hall Adams, a Commissioner of the State  
of Oregon in and for the Commonwealth of Massa-  
chusetts, at Boston, in said County and Common-  
wealth, personally appeared William H. Besse, the  
President of the Oregon Southern Improvement  
Company, and William Rotch, the Assistant Secre-  
tary of the same Company, to me respectively per-  
sonally known to be the identical persons described  
in and who executed the foregoing instrument and



to be such officers as aforesaid, who being by me severally duly sworn did depose and say and each for himself said, that they are respectively such officers as aforesaid; that the seal affixed to the foregoing instrument is the corporate seal of said Company, and that the same was so affixed thereto by order of the Board of Directors of said Company, and that they, the said Besse and Rotch, signed their names thereto by the like order as President and Assistant Secretary of said Company, respectively. And the said Bessee, as President, and the said Rotch, as Assistant Secretary, did then and there acknowledge the foregoing instrument to be the free act and deed of the Oregon Southern Improvement Company and of themselves for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and official seal this 8th day of March, 1884.

(Seal.) CHAS. HALL ADAMS,  
Commissioner of Oregon in Massachusetts.

COMMONWEALTH OF MASSACHUSETTS, Suffolk, ss.

On this 8th day of March, 1884, before me, Charles Hall Adams, a Commissioner of the State of Oregon in and for the Commonwealth of Massachusetts at Boston, in said County and Commonwealth, personally appeared Frederick M. Stone, the President of the Boston Safe Deposit and Trust Company, and Edward P. Bond, the Secretary of the same Company, to me respectively personally known to be the

identical persons described in and who executed the foregoing instrument and to be such officers as aforesaid who being by me severally duly sworn, did depose and say and each for himself said that they are respectively such officers as aforesaid, that the seal affixed to the foregoing instrument is the corporate seal of said Company, that the same was so affixed by order of the Board of Directors of said Company and that they, the said Stone and Bond, signed their names thereto by the like order as President and Secretary of said Company, respectively. And the said Stone, as President, and the said Bond, as Secretary, did then and there acknowledge the foregoing instrument to be the free act and deed of the Boston Safe Deposit and Trust Company and of themselves for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and official seal this 8th day of March, 1884.

(Seal.)

CHAS. HALL ADAMS,

Commissioner for Oregon in Massachusetts.

# EXHIBIT "G."

*Schedule showing conveyances of said granted lands subsequent to May 31st, A. D. 1875, executed by the several parties respectively, holding from time to time the legal title to said granted lands:*

Name of Purchaser.	Date of Conveyance.	Description of Land.
W. P. Mast.	Mar. 15, 1877.	Lots 5, 6, and N $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 1, Tp. 28 South, Range 12 West.
Sarah Lincoln.	Dec. 29, 1881.	E $\frac{1}{2}$ of NE $\frac{1}{4}$ , SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 9, Tp. 28 South, Range 10 West.
Jos. J. Shook.	Oct. 27, 1877.	NE $\frac{1}{4}$ of NW $\frac{1}{4}$ , SE $\frac{1}{4}$ of NW $\frac{1}{4}$ , SW $\frac{1}{4}$ of NE $\frac{1}{4}$ , N $\frac{1}{2}$ of NE $\frac{1}{4}$ of Sec. 15, Tp. 28 South, Range 11 West.
L. M. Pierce.	Mar. 15, 1877.	SW $\frac{1}{4}$ of NW $\frac{1}{4}$ , W $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 33, Tp. 27 South, Range 11 West.
Ed. Irvine.	Sep. 29, 1883.	NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 3, Tp. 26 South, Range 12 West.
Alexander Jackson.	Sep. 9, 1889.	NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 25, Tp. 28 South, Range 12 West.
W. S. Hamilton.	Sep. 15, 1890.	Lots 3 and 4, Sec. 5, Tp. 26 South, Range 12 West.
C. M. Hallan.	Apr. 3, 1885.	S $\frac{1}{2}$ of NW $\frac{1}{4}$ of Sec. 27, Tp. 27 South, Range 13 West.

*Schedule showing conveyances of said granted lands subsequent to May 31st, A. D. 1875. executed by the several parties respectively, holding from time to time the legal title to said granted lands—Continued.*

Name of Purchaser.	Date of Conveyance.	Description of Land.
S. B. Sherwood. James A. Clinton.	May 5, 1885. May 9, 1888.	NW $\frac{1}{4}$ of Sec. 7, Tp. 28 South, Range 11 West. Lot 4, NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 23, Tp. 28 South, Range 12 West.
W. H. Rogers.	May 17, 1888.	E $\frac{1}{2}$ of NE $\frac{1}{4}$ of Sec. 15, Tp. 26 South, Range 12 West.
E. P. Mast.	May 9, 1888.	W $\frac{1}{2}$ of NE $\frac{1}{4}$ , NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of Sec. 21, Tp. 27 South, Range 11 West.
Alexander Jackson.	June 7, 1888.	Lot 3, SE $\frac{1}{4}$ of SW $\frac{1}{4}$ , SE $\frac{1}{4}$ of SE $\frac{1}{4}$ , of Sec. 25, Tp. 28 South, Range 12 West.
J. D. Weekly.	Oct. 29, 1888.	Lots 3, 4 and 5, of Sec. 29, Tp. 28 South, Range 11 West.
R. J. Clinton.	July 7, 1888.	Lot 3, NE $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 23, Tp. 28 South, Range 12 West.
Geo. W. Clinton.	Feb. 2, 1889.	Lot 9, NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 25, Tp. 28 South, Range 12 West.



*Schedule showing conveyances of said granted lands subsequent to May 31st, A. D. 1875, executed by the several parties respectively, holding from time to time the legal title to said granted lands—Continued.*

Name of Purchaser.	Date of Conveyance.	Description of Land.
Jane Morgan.	May 22, 1888.	W $\frac{1}{2}$ of NE $\frac{1}{4}$ , NW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Sec. 19, Tp. 28 South, Range 12 West.
W. T. Brady.	Nov. 28, 1889.	Lots 8 and 9 of Sec. 23, Tp. 28 South, Range 12 West.
Charles Brady.	June 26, 1890.	Lot 2 of Sec. 25, Tp. 28 South, Range 12 West.
Samuel Goheen.	May 22, 1888.	N $\frac{1}{2}$ of NE $\frac{1}{4}$ of Sec. 15, Tp. 28 South, Range 10 West.
Simpson Lumber Co.	Aug. 8, 1891.	All of Sec. 23, Tp. 26 South, Range 12 West.
John and Margaret Messerle.	Oct. 26, 1909.	Lot 6 of Sec. 7, Tp. 26 South, Range 12 West.
E. B. Dean and Company.	June 21, 1882.	SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 21, Tp. 26 South, Range 12 West.
E. B. Dean and Company.	July 26, 1882.	Lots 1, 2, 3, 4, SE $\frac{1}{4}$ , E $\frac{1}{2}$ of W $\frac{1}{2}$ of Sec. 31, Tp. 26 South, Range 12 West.
		E $\frac{1}{2}$ of Sec. 25, Tp. 26 South, Range 13 West.

*Schedule showing conveyances of said granted lands subsequent to May 31st, A. D. 1875, executed by the several parties respectively, holding from time to time the legal title to said granted lands—Continued.*

Name of Purchaser.	Date of Conveyance.	Description of Land.
J. C. Haynes.	Jan. 29, 1883.	Lots 1, 2, 3, 4, SE $\frac{1}{4}$ , E $\frac{1}{2}$ of SW $\frac{1}{4}$ , E $\frac{1}{2}$ of NW $\frac{1}{4}$ of Sec. 31, Tp. 26 South, Range 12 West.
C. H. Merchant.	June 13, 1884.	
B. F. Ross.	Sep. 21, 1882.	Lots 1, 2, 3, 4, SE $\frac{1}{4}$ , S $\frac{1}{2}$ of NE $\frac{1}{4}$ , S $\frac{1}{2}$ of NW $\frac{1}{4}$ , N $\frac{1}{2}$ of SW $\frac{1}{4}$ , SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 1, Tp. 27 South, Range 13 West.
E. B. Dean.	Mar. 15, 1882.	
R. M. Gurney.	Jan. 24, 1881.	SE $\frac{1}{4}$ , E $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 21; Fractional S $\frac{1}{2}$ of NW $\frac{1}{4}$ Sec. 15, Tp. 28 South, Range 8 West.
C. B. Cannon.	Dec. 10, 1909.	Lots 5 and 6 (being fractional NE $\frac{1}{4}$ of NE $\frac{1}{4}$ , NW $\frac{1}{4}$ of NE $\frac{1}{4}$ ) of Sec. 3, Tp. 28 South, Range 6 West.

In the foregoing schedule the following abbreviations are used:

The letters "N, S, E and W," meaning respectively north, south, east and west; also "Sec." and "Tp." meaning respectively section and township. The numerical designation of townships and ranges have reference to the Willamette Meridian and the base line thereof.

### EXHIBIT "H."

Schedule of lands patented to Coos Bay Wagon Road Company and now claimed by the defendant Southern Oregon Company, being the lands referred to in paragraph XXII of the bill of complaint. These lands are situated in Douglas and Coos Counties of the State of Oregon. For convenience they are scheduled separately by Counties. Townships and Ranges are designated with reference to the Willamette Meridian and the base line thereof.

#### DOUGLAS COUNTY.

##### *Township 28 South, Range 6 West.*

Lot 10,	Sec. 7
NW $\frac{1}{4}$ ,	" 9
SE $\frac{1}{4}$ SW $\frac{1}{4}$ , S $\frac{1}{2}$ SE $\frac{1}{4}$ ,	" 23

##### *Township 28, South, Range 7 West.*

NE $\frac{1}{4}$ , NW $\frac{1}{4}$ , E $\frac{1}{2}$ SE $\frac{1}{4}$ , NW $\frac{1}{4}$ SW $\frac{1}{4}$ ,	" 5
NW $\frac{1}{4}$ NE $\frac{1}{4}$ , E $\frac{1}{2}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$ NW $\frac{1}{4}$ , E $\frac{1}{2}$ SE $\frac{1}{4}$ ,	
SW $\frac{1}{4}$ SE $\frac{1}{4}$ , SE $\frac{1}{4}$ SW $\frac{1}{4}$ ,	" 7
SW $\frac{1}{4}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ SE $\frac{1}{4}$ , W $\frac{1}{2}$ SE $\frac{1}{4}$ ,	
S $\frac{1}{2}$ SW $\frac{1}{4}$ ,	" 9
SW $\frac{1}{4}$ SE $\frac{1}{4}$ ,	" 11

$S\frac{1}{2}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SW $\frac{1}{4}$ ,	Sec. 13
Lots 1, 2, 3, 4, 5, 6, SW $\frac{1}{4}$ SE $\frac{1}{4}$ , S $\frac{1}{2}$ SW $\frac{1}{4}$ ,	" 15
SW $\frac{1}{4}$ NE $\frac{1}{4}$ , SW $\frac{1}{4}$ ,	" 17
All,	" 19
N $\frac{1}{2}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , W $\frac{1}{2}$ SW $\frac{1}{4}$ ,	" 21
Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, W $\frac{1}{2}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$	" 23
W $\frac{1}{2}$ NW $\frac{1}{4}$ ,	" 25
Lots 1, 5, 6, 7, 8, 9, 10, N $\frac{1}{2}$ NW $\frac{1}{4}$ ,	" 29
Lot 3,	" 31
Lots 1, 2,	" 33
SE $\frac{1}{4}$ , E $\frac{1}{2}$ SW $\frac{1}{4}$ ,	" 35

*Township 28 South, Range 8 West.*

SE $\frac{1}{4}$ NW $\frac{1}{4}$ ,	" 1
All,	" 3
All,	" 5
All,	" 7
All,	" 9
W $\frac{1}{2}$ NE $\frac{1}{4}$ , W $\frac{1}{2}$ ,	" 11
E $\frac{1}{2}$ NE $\frac{1}{4}$ , SW $\frac{1}{4}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ , E $\frac{1}{2}$ SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SW $\frac{1}{4}$ ,	" 13
Lot 2, NW $\frac{1}{4}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ , NW $\frac{1}{4}$ NW $\frac{1}{4}$ , W $\frac{1}{2}$ SW $\frac{1}{4}$ ,	" 15
All,	" 17
All,	" 19
N $\frac{1}{2}$ , W $\frac{1}{2}$ SW $\frac{1}{4}$ ,	" 21
Lot 4, SE $\frac{1}{4}$ SE $\frac{1}{4}$ , W $\frac{1}{2}$ SE $\frac{1}{4}$ , SW $\frac{1}{4}$	" 23
NW $\frac{1}{4}$ , NW $\frac{1}{4}$ SW $\frac{1}{4}$ ,	" 25
All,	" 27
All,	" 29
N $\frac{1}{2}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ , SW $\frac{1}{4}$ , S $\frac{1}{2}$ SE $\frac{1}{4}$ ,	" 31



*United States vs. Southern Oregon Company* 133

All,	Sec. 33
NE $\frac{1}{4}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ ,	" 35

*Township 29 South, Range 7 West.*

Lots 1, 2, 3, SW $\frac{1}{4}$ NE $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , NW $\frac{1}{4}$ SE $\frac{1}{4}$ , SW $\frac{1}{4}$ ,	Sec. 7
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*Township 29 South, Range 8 West.*

Lots 1, 2, 3, 7, 8, 9, N $\frac{1}{2}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ ,	" 1
All,	" 3
All,	" 5
NE $\frac{1}{4}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ ,	" 7
All,	" 9
E $\frac{1}{2}$ NE $\frac{1}{4}$ , SW $\frac{1}{4}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ , S $\frac{1}{2}$ ,	" 11
N $\frac{1}{2}$ ,	" 15
Lot 3, NE $\frac{1}{4}$ NE $\frac{1}{4}$ ,	" 17

*Township 29, South, Range 9 West.*

N $\frac{1}{2}$ SW $\frac{1}{4}$ ,	" 1
All,	" 3
S $\frac{1}{2}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ , W $\frac{1}{2}$ ,	" 11

COOS COUNTY.

*Township 25, Range 12.*

SE $\frac{1}{4}$ SE $\frac{1}{4}$ ,	Sec. 19
N $\frac{1}{2}$ NE $\frac{1}{4}$ , N $\frac{1}{2}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$ NE $\frac{1}{4}$ ,	" 29
E $\frac{1}{2}$ and SW $\frac{1}{4}$ ,	" 33

*Township 26, Range 12.*

Lots 1, 2, 3, 4, S $\frac{1}{2}$ NE $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$ and SE $\frac{1}{4}$ ,	Sec. 1
Lots 1, 2, 3, 4, S $\frac{1}{2}$ NE $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , S $\frac{1}{2}$ SW $\frac{1}{4}$ , NW $\frac{1}{4}$ SW $\frac{1}{4}$ ,	" 3
Lots 1, 2, 5, 6, 8, E $\frac{1}{2}$ SE $\frac{1}{4}$ , S $\frac{1}{2}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ ,	" 5

134 *United States vs. Southern Oregon Company*

Lots 2, 3, 4, $E\frac{1}{2}$ NW $\frac{1}{4}$ , $E\frac{1}{2}$ SW $\frac{1}{4}$ , W $\frac{1}{2}$ NE $\frac{1}{4}$ ,	Sec. 7
Lots 3, 4, $E\frac{1}{2}$ , $E\frac{1}{2}$ SW $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ ,	" 9
NE $\frac{1}{4}$ , NW $\frac{1}{4}$ , $E\frac{1}{2}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ , NW $\frac{1}{4}$ SW $\frac{1}{4}$ ,	" 11
All,	" 13
W $\frac{1}{2}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ , SW $\frac{1}{4}$ , SE $\frac{1}{4}$ ,	" 15
$E\frac{1}{2}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ SE $\frac{1}{4}$ ,	" 17
Lot 1, NE $\frac{1}{4}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ NE $\frac{1}{4}$ ,	" 19
NE $\frac{1}{4}$ NE $\frac{1}{4}$ ,	" 21
All,	" 25
All,	" 27
Lot 3, SE $\frac{1}{4}$ SE $\frac{1}{4}$ ,	" 29
$E\frac{1}{2}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ SW $\frac{1}{4}$ , NE $\frac{1}{4}$ SE $\frac{1}{4}$ ,	" 33
All,	" 35

*Township 26, Range 13.*

N $\frac{1}{2}$ SE $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$ ,	Sec. 1
$E\frac{1}{2}$ NE $\frac{1}{4}$ , $E\frac{1}{2}$ SE $\frac{1}{4}$ ,	" 13
Lots 6, 7,	" 23

*Township 27, Range 11.*

Lots 1, 2, 3, 4, S $\frac{1}{2}$ NE $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , and S $\frac{1}{2}$ ,	Sec. 5
Lots 1, 2, 3, 4, $E\frac{1}{2}$ NW $\frac{1}{4}$ , $E\frac{1}{2}$ SW $\frac{1}{4}$ , and $E\frac{1}{2}$ ,	" 7
All,	" 9
All,	" 17
Lots 1, 2, 3, 4, $E\frac{1}{2}$ NW $\frac{1}{4}$ , $E\frac{1}{2}$ SW $\frac{1}{4}$ , and $E\frac{1}{2}$ ,	" 19
SE $\frac{1}{4}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ , SW $\frac{1}{4}$ , SE $\frac{1}{4}$ ,	" 21
All,	" 29
Lots 1, 2, 3, 4, $E\frac{1}{2}$ NW $\frac{1}{4}$ , $E\frac{1}{2}$ SW $\frac{1}{4}$ , and $E\frac{1}{2}$ ,	" 31
NE $\frac{1}{4}$ , N $\frac{1}{2}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ , $E\frac{1}{2}$ SW $\frac{1}{4}$ , and SE $\frac{1}{4}$ ,	" 33

*Township 27, Range 12.*

All,	Sec. 1
All,	" 3

NE $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$ , and SE $\frac{1}{4}$ ,	Sec. 5
All,	" 7
All,	" 9
All,	" 11
All, (Note: The S $\frac{1}{2}$ SE $\frac{1}{4}$ has also been patented to others)	" 13
All,	" 15
All,	" 17
All,	" 19
NE $\frac{1}{4}$ , E $\frac{1}{2}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ , E $\frac{1}{2}$ SW $\frac{1}{4}$ ,	" 21
SW $\frac{1}{4}$ , and NW $\frac{1}{4}$ ,	" 23
E $\frac{1}{2}$ SW $\frac{1}{4}$ , NE $\frac{1}{4}$ and SE $\frac{1}{4}$ ,	" 25
All,	" 27
E $\frac{1}{2}$ NE $\frac{1}{4}$ , SW $\frac{1}{4}$ NE $\frac{1}{4}$ , and SE $\frac{1}{4}$ ,	" 29
Lots 3, 4, SE $\frac{1}{4}$ , NE $\frac{1}{4}$ NE $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ ,	" 31
All,	" 33
S $\frac{1}{2}$ , S $\frac{1}{2}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NE $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , NW $\frac{1}{4}$ NW $\frac{1}{4}$ ,	" 35

*Township 27, Range 13.*

Lots 1, 2, 6, W $\frac{1}{2}$ SE $\frac{1}{4}$ ,	Sec. 3
S $\frac{1}{2}$ , S $\frac{1}{2}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ ,	" 11
NE $\frac{1}{4}$ , NW $\frac{1}{4}$ , SW $\frac{1}{4}$ , S $\frac{1}{2}$ SE $\frac{1}{4}$ ,	" 13
N $\frac{1}{2}$ , SW $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$ ,	" 25
S $\frac{1}{2}$ NE $\frac{1}{4}$ , N $\frac{1}{2}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ ,	" 27
N $\frac{1}{2}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ ,	" 35

*Township 28, Range 9.*

Lots 1, 2, 3, 4, S $\frac{1}{2}$ NE $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , and S $\frac{1}{2}$ ,	Sec. 1
Lots 1, 2, 3, 4, S $\frac{1}{2}$ NE $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , and S $\frac{1}{2}$ ,	" 3
Lots 1, 2, 3, 4, S $\frac{1}{2}$ NE $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , and S $\frac{1}{2}$ ,	" 5
Lots 1, 2, 3, 4, E $\frac{1}{2}$ NW $\frac{1}{4}$ , E $\frac{1}{2}$ SW $\frac{1}{4}$ , and E $\frac{1}{2}$ ,	" 7
All,	" 9
All,	" 11

All,	Sec. 13
All,	" 15
All,	" 17
Lots 1, 2, 3, 4, $E\frac{1}{2}$ NW $\frac{1}{4}$ , $E\frac{1}{2}$ SW $\frac{1}{4}$ , and $E\frac{1}{2}$ ,	" 19
All,	" 21
All,	" 23
All,	" 25
All,	" 27
All,	" 29
Lots 1, 2, 3, 4, $E\frac{1}{2}$ NW $\frac{1}{4}$ , $E\frac{1}{2}$ SW $\frac{1}{4}$ , and $E\frac{1}{2}$ ,	" 31
All,	" 33
All,	" 35

*Township 28, Range 10.*

Lots 1, 2, 3, 4, $S\frac{1}{2}$ NE $\frac{1}{4}$ , $S\frac{1}{2}$ NW $\frac{1}{4}$ , and $S\frac{1}{2}$ ,	Sec. 1
Lots 1, 2, 3, 4, $S\frac{1}{2}$ NE $\frac{1}{4}$ , $S\frac{1}{2}$ NW $\frac{1}{4}$ , and $S\frac{1}{2}$ ,	" 3
Lots 1, 2, 3, 4, $S\frac{1}{2}$ NE $\frac{1}{4}$ , $S\frac{1}{2}$ NW $\frac{1}{4}$ , and $S\frac{1}{2}$ ,	" 5
All,	" 7
$S\frac{1}{2}$ , NW $\frac{1}{4}$ , NW $\frac{1}{4}$ NE $\frac{1}{4}$ ,	" 9
N $\frac{1}{2}$ NE $\frac{1}{4}$ , $E\frac{1}{2}$ SE $\frac{1}{4}$ , $E\frac{1}{2}$ NW $\frac{1}{4}$ , and $S\frac{1}{2}$ SW $\frac{1}{4}$ ,	" 11
All,	" 13
$S\frac{1}{2}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ , Part SW $\frac{1}{4}$ , and SE $\frac{1}{4}$ ,	" 15
All,	" 17
All,	" 19
All,	" 21
All,	" 23
All,	" 25
All,	" 27
All,	" 29
All,	" 31

*Township 28, Range 11.*

Lots 1, 2, 3, 4, $S\frac{1}{2}$ NE $\frac{1}{4}$ , $S\frac{1}{2}$ NW $\frac{1}{4}$ , and $S\frac{1}{2}$ ,	Sec. 1
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Lots 1, 2, $S\frac{1}{2}$ NE $\frac{1}{4}$ , $S\frac{1}{2}$ NW $\frac{1}{4}$ , and $S\frac{1}{2}$ ,	Sec. 3
Lots 1, 2, 3, 4, $S\frac{1}{2}$ NE $\frac{1}{4}$ , $S\frac{1}{2}$ NW $\frac{1}{4}$ , and $S\frac{1}{2}$ ,	" 5
Lots 3, 4, $E\frac{1}{2}$ SW $\frac{1}{4}$ , and $E\frac{1}{2}$ ,	" 7
All,	" 9
All,	" 11
All,	" 13
SE $\frac{1}{4}$ NE $\frac{1}{4}$ , W $\frac{1}{2}$ NW $\frac{1}{4}$ , and SE $\frac{1}{4}$ ,	" 15
All,	" 17
Lots 1, 2, 3, 4, $E\frac{1}{2}$ NW $\frac{1}{4}$ , $E\frac{1}{2}$ SW $\frac{1}{4}$ , and $E\frac{1}{2}$ ,	" 19
Lots 1, 2, 3, 4, 5, SW $\frac{1}{4}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ NE $\frac{1}{4}$ , N $\frac{1}{2}$ NW $\frac{1}{4}$ , S $\frac{1}{2}$ SE $\frac{1}{4}$ , NW $\frac{1}{4}$ SW $\frac{1}{4}$ ,	" 21
All,	" 23
All,	" 25
All,	" 27
Lots 1, 2, 6, 7, 8, 9, and 10, NW $\frac{1}{4}$ , W $\frac{1}{2}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$ ,	" 29
Lots 1, 2, 3, 4, $E\frac{1}{2}$ NW $\frac{1}{4}$ , $E\frac{1}{2}$ SW $\frac{1}{4}$ , and $E\frac{1}{2}$ ,	" 31
All,	" 33
All,	" 35

*Township 28, Range 12.*

Lots 1, 2, 3, 4, $S\frac{1}{2}$ NE $\frac{1}{4}$ , $S\frac{1}{2}$ NW $\frac{1}{4}$ , and SE $\frac{1}{4}$ ,	Sec. 1
Lots 1, 2, 3, 4, $S\frac{1}{2}$ NE $\frac{1}{4}$ , $S\frac{1}{2}$ NW $\frac{1}{4}$ , and $S\frac{1}{2}$ ,	" 3
Lots 1, 2, 3, 4, $S\frac{1}{2}$ NE $\frac{1}{4}$ , $S\frac{1}{2}$ NW $\frac{1}{4}$ , and $S\frac{1}{2}$ ,	" 5
N $\frac{1}{2}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ NW $\frac{1}{4}$ , and $E\frac{1}{2}$ SE $\frac{1}{4}$ ,	" 7
All, ,	" 9
N $\frac{1}{2}$ SW $\frac{1}{4}$ , $S\frac{1}{2}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ , and SE $\frac{1}{4}$ ,	" 11
Lots 1, 2, 3, $S\frac{1}{2}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ , and $S\frac{1}{2}$ ,	" 13
Lots 1, 2, 3, 4, 8, 9, SW $\frac{1}{4}$ SW $\frac{1}{4}$ , and NW $\frac{1}{4}$ ,	" 15
All,	" 17
SE $\frac{1}{4}$ SE $\frac{1}{4}$ ,	" 19
N $\frac{1}{2}$ SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SW $\frac{1}{4}$ , N $\frac{1}{2}$ SE $\frac{1}{4}$ , SE $\frac{1}{4}$ SE $\frac{1}{4}$ , and N $\frac{1}{2}$ ,	" 21

138 *United States vs. Southern Oregon Company*

Lots 1, 2, 5, 6, 7, $N\frac{1}{2}$ $NE\frac{1}{4}$ , $S\frac{1}{2}$ $SW\frac{1}{4}$ , and $SE\frac{1}{4}$ ,	Sec. 23
Lots 1, 6, 7, 8, $NE\frac{1}{4}$ $NE\frac{1}{4}$ , $SW\frac{1}{4}$ $NW\frac{1}{4}$ ,	" 25
Lots 1, 2, 3, 4, $S\frac{1}{2}$ $NE\frac{1}{4}$ , $S\frac{1}{2}$ $NW\frac{1}{4}$ , and $S\frac{1}{2}$ ,	" 27
$N\frac{1}{2}$ , $E\frac{1}{2}$ $SW\frac{1}{4}$ and $SE\frac{1}{4}$ ,	" 29

*Township 29, Range 9.*

Lots 1, 2, 3, 4, $S\frac{1}{2}$ $NE\frac{1}{4}$ , $S\frac{1}{2}$ $NW\frac{1}{4}$ , and $S\frac{1}{2}$ ,	Sec. 5
Lots 1, 2, 3, 4, $E\frac{1}{2}$ $NW\frac{1}{4}$ , $E\frac{1}{2}$ $SW\frac{1}{4}$ , and $E\frac{1}{2}$ ,	" 7
All,	" 9

*Township 29, Range 10.*

Lots 1, 2, 3, 4, $S\frac{1}{2}$ $NE\frac{1}{4}$ , $S\frac{1}{2}$ $NW\frac{1}{4}$ , and $S\frac{1}{2}$ ,	Sec. 1
Lots 1, 2, 3, 4, $S\frac{1}{2}$ $NE\frac{1}{4}$ , $S\frac{1}{2}$ $NW\frac{1}{4}$ , and $S\frac{1}{2}$ ,	" 3
Lots 1, 2, 3, 4, $S\frac{1}{2}$ $NE\frac{1}{4}$ , $S\frac{1}{2}$ $NW\frac{1}{4}$ , and $S\frac{1}{2}$ ,	" 5
Lots 1, 2, 3, 4, $E\frac{1}{2}$ $NW\frac{1}{4}$ , $E\frac{1}{2}$ $SW\frac{1}{4}$ , and $E\frac{1}{2}$ ,	" 7
All,	" 9
All,	" 11

*Township 29, Range 11.*

Lots 1, 2, 3, 4, $S\frac{1}{2}$ $NE\frac{1}{4}$ , $S\frac{1}{2}$ $NW\frac{1}{4}$ , and $S\frac{1}{2}$ ,	Sec. 1
Lots 1, 2, 3, 4, $S\frac{1}{2}$ $NE\frac{1}{4}$ , $S\frac{1}{2}$ $NW\frac{1}{4}$ , and $S\frac{1}{2}$ ,	" 3
Lots 1, 2, 3, 4, $S\frac{1}{2}$ $NE\frac{1}{4}$ , $S\frac{1}{2}$ $NW\frac{1}{4}$ , and $S\frac{1}{2}$ ,	" 5

Filed December 27, 1910.

G. H. MARSH,  
Clerk.

And afterwards, to wit, on the 4th day of March, 1911, there was duly filed in said Court a Demurrer to Bill of Complaint, in words and figures as follows, to wit:

DEMURRER TO BILL OF COMPLAINT.

*In the Circuit Court of the United States,  
District of Oregon.*

Ninth Judicial District.

United States of America, Complainant,

vs.

In Equity.

Southern Oregon Company, Defendant. No.....

The Demurrer of the Defendant Southern Oregon Company to Complainant's Bill of Complaint herein:

This defendant, the Southern Oregon Company, by protestation, not confessing or acknowledging all or any of the matters and things in said Bill of Complaint to be true in such manner or form as the same are therein set forth and alleged, demurs thereto, and to the whole thereto. And for cause of demurrer to said Bill and the whole thereof, shows:

I.

As against this defendant, the said Bill is without any equity whatever.

II.

As against this defendant, the said Bill does not set forth or show any matter, equity or cause entitling complainant to any discovery whatsoever.

III.

The said Bill as against this defendant does

not set forth or show any matter, equity or cause entitling complainant to a decree forfeiting the lands granted by the Act of Congress approved March 3, A. D. 1869, as referred to in Complainant's Bill, or any lands.

## IV.

As against this defendant the said Bill does not set forth or show any matter, equity or cause entitling complainant to a decree reverting or reinvesting said lands, or any of them, in, or declaring the same to be the property of complainant.

## V.

As against this defendant this Bill does not set forth or show any matter, equity or cause entitling complainant to a decree quieting or confirming the title of complainant in or to all or any of said lands, or as against any claim or right or title or interest or lien on behalf of this defendant.

## VI.

As against this defendant the said Bill does not set forth or show any matter, equity or cause entitling complainant to a decree enjoining or restraining this defendant, its officers or agents, from claiming or asserting a right, title or interest in said lands, or selling or offering to sell the same, or from going upon said lands or cutting or removing the timber therefrom, or to any injunction or restraining order whatever.

## VII.

As against this defendant the said Bill is without equity and does not state facts sufficient to



constitute cause of suit or entitle complainant to any relief whatever.

Wherefore, this defendant prays the judgment of this Honorable Court whether it shall be compelled to make any further or other answer to the said Bill, or any of the matters and things therein contained, and prays to be hence dismissed, with its reasonable costs in this behalf sustained.

DOLPH, MALLORY, SIMON & GEARIN,  
Counsel for Defendant.

United States of America, District of Oregon, ss.

Elijah Smith makes solemn oath and says that he is president of the Southern Oregon Company, named as defendant in the foregoing demurrer, and that said demurrer is not interposed for delay.

ELIJAH SMITH.

Subscribed and sworn to before me this 4th day of March, A. D. 1911.

(Seal.)

B. B. McCARTHY,  
Notary Public for Oregon.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

JNO. M. GEARIN.

State of Oregon, County of Multnomah, ss.

Due and legal service of the within demurrer is hereby accepted in Multnomah County, Oregon, this 4th day of March, 1911, by receiving a copy thereof,

duly certified to as such by Jno. M. Gearin, of attorneys for defendant.

JOHN McCOURT,

One of Attorneys for Complainant and U. S. Attorney.

Filed March 4, 1911.

G. H. MARSH,

Clerk.

*In the District Court of the United States for the  
District of Oregon.*

And afterwards, to wit, on Monday, the 5th day of May, 1913, the same being the fifty-fifth judicial day of the regular March term of said court; present, the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

ORDER OVERRULING DEMURRER

*In the District Court of the United States for the  
District of Oregon.*

The United States

No. 3701.

v.

Southern Oregon Company.

May 5, 1913.

This cause heretofore submitted upon demurrer to bill, came on regularly at this time for the ruling and decision of the court; whereupon, after due consideration, it is ordered that said demurrer be and the same is hereby overruled; it is further ordered that defendant have and hereby is granted 30 days from date hereof to serve answer herein.

And afterwards, to wit, on the 17th day of June, 1913, there was duly filed in said Court an Answer, with amendments made by leave of Court, in words and figures as follows, to wit:

ANSWER.

*In the District Court of the United States for the  
District of Oregon.*

Ninth Judicial Circuit.

United States of America, Plaintiff,

vs.

Southern Oregon Company, Defendant.

The defendant, now and at all times saving to itself all and all manner of benefit and advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in Complainant's Bill (hereinafter called "the Bill") contained, for answer thereto, or to so much and such parts thereof as it is advised it is material or necessary for it to make answer to, answering, says:

I.

Defendant admits that the allegations of Paragraphs I and II of the Bill are true.

II.

Admits that said Act of Congress approved March 3, 1869, set out in said Paragraph II, contained no provision authorizing the issuance of patents for the lands granted by said act, and admits that on or about the 18th day of June, 1874, the Act of Congress set out in Paragraph III of

said Bill was passed and approved as in said paragraph alleged, but this defendant does not know and therefore neither admits nor denies that said provision for issuing patents for the land granted by said Act of March 3, 1869, was omitted from the Bill inadvertently or purposely, or whether the said Act of Congress of June 18, 1874, was passed to correct said alleged omission.

### III.

Admits the allegations in Paragraph IV of said Bill to be true; admits that the Legislative Assembly of the State of Oregon on the 22d day of October, 1870, passed the act in said Bill set forth, but said Bill does not set forth all the matters contained in said act approved October 22, 1870, but omits therefrom the preamble which is a part of said act and which is in words and figures as follows: "Whereas, the Congress of the United States, at the session beginning on the 7th day of December, 1868, passed an act donating lands to the State of Oregon, which act is hereby set forth, to-wit: An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, in said state," which preamble is hereby made a part of this answer to be considered as a part of said Act of October 22, 1870.

### IV.

Admits the allegations of Paragraph V of said Bill to be true.



V.

Defendant denies that it assumed to or did exercise or enjoy the several or any rights, privileges or benefits of the Acts of Congress pleaded in Complainant's Bill, or the said Act of the Legislative Assembly of the State of Oregon, in the manner alleged in the Bill, and, or, not otherwise, or at all, except as in this answer set out. Denies that in pursuance of the premises the United States of America, acting by or under the authority of the President of the United States, did issue or deliver to the said Coos Bay Wagon Road Company the patents of the United States for all or for any of said lands granted by such Act of Congress approved March 3, 1869, but defendant avers the fact to be that said patents were issued and delivered by the United States of America in pursuance and by authority of the Act of Congress approved the 18th day of June, 1874, in Paragraph III of said Bill set forth.

VI.

Admits the allegations of Paragraph VII of said Bill to be true. Admits the allegations of Paragraph VII of said Bill to be true, except this defendant says that said road was fully built and completed prior to October 2, 1872, and that the Governor of the State of Oregon, as by said act provided, duly certified the completion and acceptance of said road in different sections, forming the completed road, as follows: December 10, 1870, September 19, 1872, and October 2, 1872.

## VII.

Answering Paragraph VIII of said Bill, defendant admits that the Coos Bay Wagon Road Company, its officers and stockholders, transferred to one person an unconditional fee simple title to 96,676.96 acres of said granted land, and that on or about the 31st day of May, 1875, sold all the aforesaid granted lands (except such thereof as had been already sold and conveyed), aggregating approximately 96,676.96 acres, to one purchaser, to-wit, one John Miller; and admits that on the said 31st day of May, 1875, said Coos Bay Wagon Road Company entered into the contract mentioned in said Paragraph VIII of said Bill, bearing date the 31st day of May, 1875, marked Exhibit "B" and attached to said Bill. But defendant says it is not true, and it denies that the said sale was made or the said contract was entered into in evasion of the restrictions or of any restriction or restrictions upon the disposition or sale of the said granted lands, but, on the contrary, avers that said contract was duly and regularly and legally entered into and the said sale was made in good faith, and deeds conveying the title to said lands described in Patent No. 1 were executed and delivered to the purchaser thereof in good faith and for valuable consideration, the said Coos Bay Wagon Road Company then and there having and holding the unconditional fee simple title to all said lands evidenced by Patent No. 1 pleaded in the Bill. That subsequently patents of the United

States duly authorized by Act of Congress of the United States were duly executed and delivered to the said Coos Bay Wagon Road Company by the proper officers of the United States for all the remaining lands contained in said grant, and are patents numbered 2, 3 and 4 in Paragraph VI of the Bill.

VIII.

Admits that at the time the said contract with the said Miller was entered into, to-wit, May 31, 1895, 42,496.93 acres of the land embraced in said grant had been patented, and said 42,496.93 acres were included in and covered by Patent No. 1, dated February 12, 1875.

IX.

Admits that on the 31st day of May, 1875, in partial execution of the said contract for the sale of said land to said Miller, the said Coos Bay Wagon Road Company executed and delivered to said John Miller a deed of conveyance conveying to said John Miller all the lands embraced in said Patent No. 1, except such thereof as had been conveyed to other purchasers in said Bill mentioned. Admits that the total amount of land embraced in said deed of conveyance aggregated 35,534 acres. Admits that on the 31st day of May, 1875, said Coos Bay Wagon Road Company, by deed duly executed, conveyed to said John Miller the Coos Bay Wagon Road, to aid in the construction of which the said land described in said Act of Congress, approved March 3, 1869, was passed; but defendant



says it is not true and it denies that the said deeds to said Miller for the said 35,534 acres of said land grant and of said wagon road were, or either of them was, made in violation of the terms or conditions of said Act of March 3, 1869; and defendant further says it is not true and it denies that said deeds from the said Coos Bay Wagon Road Company were, or either of them was, made in further or in any violation of the terms, provisions or conditions of said Act of Congress approved March 3, 1869, and avers that the said sale and conveyance of said 35,534 acres of land and of said Coos Bay Wagon Road to the said Miller was in good faith, for valuable consideration and by virtue of authority duly vested in said Coos Bay Wagon Road Company by unconditional patents of the United States, duly executed and delivered to said company under and by authority of the said Act of Congress approved June 18, 1874, in Paragraph IV of the Bill set forth in full.

X.

Answering Paragraph X of said Bill, this defendant says it is without knowledge as to whether the said John Miller, in said Paragraph X named, had any beneficial interest in the transactions in said paragraph referred to, or was acting only as agent for said Huntington, Crocker, Stanford and Hopkins, or as to whether said parties were the actual parties in interest as purchasers under the said contract of May 31, 1875, entered into as aforesaid between the said Coos Bay Wagon Road



Company and the said stockholders thereof, and the said John Miller, or whether said Huntington, Crocker, Stanford and Hopkins, or either of them, were or was the real parties or party in interest under said deeds of conveyance executed and delivered by said Coos Bay Wagon Road Company to said John Miller. Defendant says it is not true, and it denies, that for the purpose of concealing the true facts in the premises, said contract or deed or deeds of conveyance was consummated in the name of said John Miller. On the contrary, this defendant avers the facts to be that the said contract between the said Coos Bay Wagon Road Company and the deeds made in pursuance thereof were executed in the utmost good faith on the part of the Coos Bay Wagon Road Company and with the distinct understanding and honest belief that the said Miller was the real party in interest in said contract and deeds, and that said company had no knowledge, notion or information that said contract or the said conveyances were made to the said Miller, as trustee for the said Huntington, Crocker, Stanford and Hopkins, or either of them. And defendant avers that said contract was made with and said deeds of conveyance executed to the said Miller in good faith and for the purposes described in and apparent on the face thereof, and not otherwise. That after said contract was executed and said deeds conveying said property to said Miller were made and delivered, said Miller, as defendant is informed and believes, and so avers, and for

the consideration expressed therein, executed and delivered to said Huntington, Crocker, Stanford and Hopkins the deeds of conveyance in said Paragraph X in the Bill mentioned.

## XI.

Answering Paragraph XI of the Bill, defendant admits that on the 22d day of June, 1875, said John Miller delivered to said Huntington, Crocker, Stanford and Hopkins two deeds of conveyance, each bearing date the 22d day of June, 1875, by one of which deeds the said John Miller conveyed to the said Huntington, Crocker, Stanford and Hopkins the said Coos Bay Wagon Road, and by the other of said deeds the said Miller conveyed to the same parties all the said lands conveyed to the said Miller by said Coos Bay Wagon Road Company, and admits that said deeds were each filed and recorded as in said Paragraph XI of the Bill stated.

## XII.

Answering Paragraph XII of the Bill, defendant admits that by the terms of said contract of May 31, 1875, between the said Coos Bay Wagon Road Company and the stockholders thereof and said John Miller (a copy of which is attached to said Bill and marked Exhibit "B"), said Coos Bay Wagon Road Company did sell to said John Miller (but not for the use or benefit of others) all of the property of the said Coos Bay Wagon Road Company, and by the terms of said contract the stockholders of said Coos Bay Wagon Road Com-

pany did sell and agree to assign to said John Miller for himself (and not for the use and benefit of others) all of the corporate stock of the said Coos Bay Wagon Road Company, the directors at the same time agreeing to continue to act as directors of said Coos Bay Wagon Road Company for the benefit of the said John Miller, but not for the persons, or for any person or persons for whom said Miller was acting, as alleged in said Bill, or otherwise, except for the use and benefit of said Miller.

But defendant says it is not true and it denies that the purpose, intent or practical or other effect of said last-mentioned provision of said contract of May 31, 1875, was to enable the persons who had purchased all of the lands granted by said Act of Congress approved March 3, 1869, to conceal the premises from the plaintiff or from the officers of the United States having authority in the premises, or for the causes or reasons in the Bill stated, to apply for or obtain from the plaintiff patents in the name of the Coos Bay Wagon Road Company for that portion of the said granted lands which were then unpatented, and denies that the purpose, intent or practical effect of said last-named provision of said contract of May 31, 1875, was otherwise than hereinafter stated.

Defendant further answering Paragraph XII of the Bill avers that the corporate existence of the Coos Bay Wagon Road Company was maintained, but avers that it was not maintained in



pursuance of the premises alleged in the Bill, and says it is not true and it denies that all, each or any of the facts in Paragraphs VIII, IX, X, XI and XII of the Bill were concealed from the plaintiff or from all or from any of the aforesaid officers of the United States having authority in the premises, or concealed at all.

Defendant admits that the plaintiff did issue and deliver to the Coos Bay Wagon Road Company patents numbered 2, 3 and 4 in said Paragraph XII of the Bill mentioned, embracing 62,623.18 acres, but denies that said patents, or either of them, were so issued by the United States in ignorance of any fact or facts as stated in the Bill.

Further answering said Paragraph XII, defendant avers that at the time said contract of May 31, 1875, for the sale of said lands and the capital stock of the said Coos Bay Wagon Road Company to the said John Miller, the Congress of the United States, by act approved the 18th day of June, 1874, had approved and ratified the action of the Legislative Assembly of the State of Oregon, passed October 22, 1870, granting to the Coos Bay Wagon Road Company the land granted to said state by Act of Congress approved March 3, 1869, and therein ordered and directed patents for said granted land to be issued and delivered to said Coos Bay Wagon Road Company upon the terms and conditions in said Act of June 18, 1874, stated.

That on, to-wit, May 31, 1875, the said wagon road had been fully completed and its completion



duly certified to the Secretary of the Interior by the Governor of the State of Oregon, as by said Act of June 18, 1874, provided, and the whole of said land, to-wit, 105,120.11 acres, had been fully earned, and the said Coos Bay Wagon Road Company was then entitled to patents therefor. And defendant says that patents had been issued and delivered to said company for 42,496.93 acres and no more, leaving then earned and unpatented 62,623.18 acres. That no authority existed for the issuance of patents for said unpatented lands to anyone other than to the said Coos Bay Wagon Road Company, and that the effect of an assignment and delivery of all the capital stock of said Coos Bay Wagon Road Company to the said Miller at the date of said contract under the laws then in force in Oregon would have been to disincorporate and destroy said corporation, leaving no one else to whom patents for said earned and unpatented lands could issue or be delivered. For that reason and to the end that the said Coos Bay Wagon Road Company should be in condition to take and receive said patents when issued, and to enable said company to comply with its contract in that behalf to convey said lands so earned to said John Miller when patents therefor should be thereafter issued, and for no other purpose whatsoever, said stockholders retained the said stock and said directors remained in office and thereby maintained said corporation in existence until after

said remaining patents had been issued and delivered.

That said transactions were each and all open and not concealed from the plaintiff or from the officers of the United States having the issuance of said patents in charge, or from any person or persons whomsoever.

### XIII.

Defendant answering Paragraph XIII of said Bill admits that said paragraph is true.

### XIV.

Defendant admits the allegations of Paragraph XIV of the Bill to be true, except that as to the lands embraced in said patents 2, 3 and 4 in the said contract of May 31, 1875, mentioned, said contract was not executed except as in said Paragraph XIV and this answer hereinafter stated. But defendant denies that the said deed of January 7, 1884, conveying said lands embraced in said patents Nos. 2, 3 and 4 was made in violation of the, or of any of the, terms, conditions or provisions of said Act of Congress of March 3, 1869, for the reason that prior to the execution of said deed and by an act approved June 18, 1874, Congress waived all the conditions of said Act of March 3, 1869, except as provided therein, and authorized patents to issue to the said Coos Bay Wagon Road Company free and clear of all conditions, except in said act set forth. And denies that in each, all or any of the transactions in said Paragraph XIV set forth, the said W. H. Bessee

and Russel Gray, or either of them, acted as the agent of or on behalf of said Oregon Southern Improvement Company, except as hereinafter in their answer admitted.

Admits that in the meantime said Miller released all his rights in said premises as hereinafter stated, and not otherwise.

XV.

Defendant admits the allegations of Paragraph XV of the Bill to be true, except that it says it is not true and it denies that either of the said deeds of trust of January 1, 1884, or May 1, 1885, executed by the said Oregon Southern Improvement Company to the Boston Safe Deposit Company was in violation of any of the terms, provisions or conditions of the said Act of March 3, 1869, for reasons hereinbefore in this answer stated, with reference to the conveyance of said lands by the Coos Bay Wagon Road Company to the Oregon Southern Improvement Company by deed dated the 7th day of January, 1884.

XVI.

Defendant answering Paragraph XVI of the Bill, says it believes the allegations of said paragraph are true.

XVII.

Answering Paragraph XVII of the Bill to the effect that said William J. Rotch, Edward D. Mandell and William W. Crapo acted as agents and for the benefit of the Oregon Southern Improvement Company and the officers, stockholders

and owners thereof, and that said defendant Southern Oregon Company was organized by the said officers, stockholders and owners of said Oregon Southern Improvement Company and was but a reorganization of said last-named company; that the stockholders of the defendant Southern Oregon Company were identical with the former stockholders of said Oregon Southern Improvement Company, and that their respective interests in said Southern Oregon Company were proportionately identical with their former respective interests in said Oregon Southern Improvement Company, this defendant neither admits nor denies.

But defendant says it is not true and it denies that the deeds and mortgages, or any deed or mortgage, executed or delivered to said Boston Safe Deposit & Trust Company were or was executed or delivered for the benefit or use of the said officers, stockholders or owners of the said Oregon Southern Improvement Company, or any of them, and denies that said alleged indebtedness secured by said mortgage was fictitious, feigned or untrue, or represented simply the interest of the stockholders or certain thereof, of the said Oregon Southern Improvement Company. Denies that said mortgages, or either of them, executed and delivered to said Boston Safe Deposit & Trust Company were executed, delivered or foreclosed by the officers, stockholders or owners of said Oregon Southern Improvement Company with the intent or in the hope that by the aforesaid foreclosure sale the



aforesaid restrictions upon the sale and disposition of said granted lands established by the terms of said Act of Congress, approved March 3, 1869, might be evaded or defeated or the rights of the plaintiff in the premises might be hindered, impaired or destroyed, or that the aforesaid alleged conditional estate created by said act approved March 3, 1869, might be converted into an unconditional estate for the use or benefit of the said officers, stockholders or owners of said Oregon Southern Improvement Company. Denies that none of said bonds purported to have been secured by said deeds of trust or mortgage were held or owned by others than the said officers, stockholders and owners of the said Oregon Southern Improvement Company. Denies that the alleged price purported to have been paid at said foreclosure sale was not in fact paid, or if paid at all, was paid by the aforesaid officers, stockholders and owners of said Oregon Southern Improvement Company unto themselves or constituted a mere nominal transaction, or was designed or executed by the parties thereto for the purposes in the Bill mentioned, and denies that any portion of the said sum received as alleged upon the sale of said property of the said Oregon Southern Improvement Company was paid to any director, stockholder or owner of said Oregon Southern Improvement Company, except such sum as such director, stockholder or owner was justly and honestly entitled to as a bona fide stockholder or holder of the bonds of

said Oregon Southern Improvement Company, acquired for valuable consideration justly and honestly paid.

Defendant says it is not true and it denies that, for the reasons in the Bill thereinbefore stated, or for any reason whatever, the execution, delivery or foreclosure of said deeds of trust or mortgages, or the foreclosure and sale thereunder, involved no actual change of interest whatsoever in the ownership of said lands or any part thereof; but defendant avers that all the proceedings connected with the execution, delivery and foreclosure of the said deeds of trust or mortgages were in good faith and the title to the lands involved therein was affected in the exact manner and to the same extent as appears upon the face of the records thereof. That the title to said property actually passed by said sale to the purchasers thereof out of the said Oregon Southern Improvement Company and was afterward in due form in fact and in good faith and for valuable consideration acquired by the said Southern Oregon Company, by which the same is now held. All of which last-named facts the said plaintiff and its representatives having the matter in charge well knew, or could by proper inquiry have known at and long prior to the time when the plaintiff's Bill herein was framed or filed.

#### XVIII.

Defendant admits that Paragraph XVIII of the Bill is true.

XIX.

Defendant admits that it believes that Paragraph XIX of said Bill is true, except that it says it is not true and it denies that said lands are of a value exceeding four million dollars, and avers that said lands are not worth a greater sum than one million dollars. And defendant denies that said lands or any of them are unoccupied, and alleges in relation thereto that defendant is and ever since the 14th day of December, 1887, has been in possession of all of said lands, claiming the same openly and adversely against all persons whomsoever, including the complainant herein.

XX.

Admits that Paragraph XX of the Bill is true.

XXI.

Answering Paragraph XXI of the Bill, defendant denies each and every allegation in said Paragraph XXI of Complainant's Bill.

XXII.

Answering Paragraph XXII of the Bill, defendant admits that it now asserts and assumes to exercise and enjoy an unconditional estate in and to all of said land described in said schedule to said Bill appended and marked Exhibit "H," free from each and all the said terms, provisions and conditions of the Act of Congress approved March 3, 1869, but denies that such claim is in violation of all or any of the terms, conditions or provisions of said act.

## XXIII.

Answering Paragraph XXIII of the Bill, this defendant admits that the lands granted by said Act of Congress approved March 3, 1869, during all the times in the Bill mentioned were, and still are, situated in one of the most remote portions of the State of Oregon, and were and are difficult of access. Admits that said Coos Bay Wagon Road Company and its successors in interest have from time to time sold certain of said lands in small quantities, but this defendant says it is not true and it denies that neither the Coos Bay Wagon Road Company nor any of the said parties succeeding to the rights of said company appeared to be, or were known to the plaintiff to be claiming or asserting any estate in said lands in violation of any of the terms, provisions or conditions of said Act of Congress approved March 3, 1869. And defendant says it is not true that each, all or any of said parties were ostensibly or otherwise asserting or claiming no rights in or to said lands except as the beneficiaries of the general franchises and benefits of said Act of March 3, 1869, and subject to all the aforesaid terms, conditions and provisions thereof.

This defendant says it is not true and it denies that by reason of the premises as in the Bill stated, or of any premises whatever, the said alleged violations, or any violation or violations, of the terms, provisions or conditions of said Act of Congress approved March 3, 1869, were concealed



from or wholly or at all unknown to the plaintiff until on or about the year 1907, but defendant alleges the fact to be as hereinafter in this answer stated.

Admits that the joint resolution set out in said Paragraph XXIII of the Bill passed the Congress of the United States and was approved April 30, 1908.

#### XXIV.

Answering Paragraph XXIV of the Bill, this defendant says the allegations of said paragraph are not true and it denies the same.

#### XXV.

Answering Paragraph XXV of the Bill, this defendant says the allegations of said paragraph, except the prayer therein for process, are wholly and altogether untrue and false in every particular, and defendant denies the said allegations and each of them.

#### XXVI.

The defendant, in addition to the foregoing answer, avers that the said Coos Bay Wagon Road Company, in pursuance of the said Act of the Legislative Assembly of the State of Oregon approved October 22, 1870, proceeded with the construction of the said wagon road to aid in the construction of which said land grant was made to the State of Oregon, and whenever and as often as any continuous section of ten (10) miles of said road was completed such completion was duly certified by the Governor of said state to the Secretary of the

Interior until the entire line of road was completed. That said road was completed and certified as aforesaid before the 3d day of March, 1874. That as said sections of said road were completed the said Coos Bay Wagon Road Company made sales for all of said lands for which it could find purchasers, such sales being made in quantities both more and less than 160 acres to one purchaser, as purchasers could be found.

That on the 5th day of December, 1873, said company sold and conveyed by deed of the date last aforesaid to one J. M. Eberline 760 acres of said land; and on the 8th day of February, 1875, sold to one Thos. J. Beale 1,020 acres thereof; and on the 31st day of May, 1875, said Coos Bay Wagon Road Company sold and agreed to convey to one John Miller the whole of the lands embraced in said grant and not already disposed of. That all of said lands lay within the Counties of Douglas and Coos in the State of Oregon. That all deeds for all the lands so sold were in due course executed and delivered and each deed was duly recorded in the Record of Deeds in the county in which said land lay. That in pursuance of said sale of the said lands to said Miller and through mense conveyances thereafter duly made and timely recorded, the whole of the said granted lands remaining undisposed of on the said 31st day of May, 1875, passed to and title thereto became and now is vested in the defendant herein.

The defendant further says that from the time

of the making of the said grant of lands to the State of Oregon to the commencement of this suit more than forty-three years have elapsed, and that during all the time since the 22d day of October, 1870, the said Coos Bay Wagon Road Company, and all persons claiming under said company, including this defendant, have been in possession of and have openly, notoriously and adversely to every one, including plaintiff herein, claimed to be the owners in fee simple of said granted lands, free and clear of all conditions, and have during said entire term bought, sold, conveyed, mortgaged and pledged said lands in all respects and to all intents and purposes the same as one claiming such ownership would do, of all of which the United States, the plaintiff herein, had actual and constructive notice, and during all said time remained silent and acquiesced in such claim.

XXVII.

This defendant, further answering the Bill, avers that all causes of suit or action set forth in the Bill are barred as follows:

(a) By Section 391 of Lord's Oregon Laws.

(b) By Section 8 of the Act of Congress approved March 3, 1891, entitled "An Act to amend Section 8 of an act approved March 3, 1891, entitled an Act to repeal timber culture laws and for other purposes," published in Vol. 26 U. S. Statutes at Large, page 1098.

(c) By the first section of the Act of Congress approved March 2, 1896, entitled "An Act to pro-

vide for the extension of time within which suits may be brought to vacate and annul land patents and for other purposes," published in Vol. 29 U. S. Statutes at Large, page 42.

(d) By laches, acquiescence and ratification and estoppel arising therefrom as follows:

That notwithstanding the proviso in the Act of March 3, 1869, purporting to restrict sales of land to any one person to not more than 160 acres, the State of Oregon, grantee in said act, duly enacted the Act of October 22, 1870, pleaded in the Bill, and duly notified the Government of the United States of the passage of said act, and on the 18th day of June, 1874, and ever since October 22, 1870, the Congress of the United States was fully advised of said Act of the Legislative Assembly of the State of Oregon of October 22, 1870, and the provisions thereof, and with said knowledge duly enacted the Act of June 18, 1874, pleaded in the Bill, and in pursuance of such act duly executed patents described in the Bill to the Coos Bay Wagon Road Company.

That ever since the completion of said road in the year 18.., the Coos Bay Wagon Road Company, Oregon Southern Improvement Company, this defendant, and the various intermediary holders of the title to said lands between said Coos Bay Wagon Road Company and this defendant have continuously, openly and notoriously claimed the unconditional fee simple title to said lands and exercised complete acts of ownership over the same



and took and held such possession thereof as the nature of the lands admitted, claiming adversely to the United States and all persons whomsoever.

That during all said time and after the completion of said road as above set out, the United States entered upon the use of said road and continued and still continues to use the same as and for a public highway, free from tolls or other charges, for the transportation of property, troops and mails of the United States, and without any claim being made against the United States for said service by any of said grantees of this defendant.

That the various transfers hereinabove set out were evidenced by deeds and contracts in writing, spread upon the public records of the State of Oregon in books provided by law for that purpose, and complainant had at all times full and complete notice of the various transactions hereinabove referred to and set out, and has during said forty years acquiesced in the claim made by this defendant and its mesne conveyancers from said Coos Bay Wagon Road Company, and is, and of right should be, forever estopped from setting up any claim to said lands, either by forfeiture or otherwise.

## XXVIII.

This defendant further avers that at the time the said Act approved March 3, 1869, came up for action before the House of Representatives of the 40th Congress of the United States, the first pro-

viso in said act, to-wit, "Provided, further, that the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one-quarter section, and for a price not exceeding two dollars and fifty cents per acre," was not contained therein, but the same was offered as an amendment and adopted without having been considered by the Committee on Public Lands and without any knowledge on the part of the members of said House of Representatives of the actual condition, quality and character of said land and without knowledge or means of ascertaining what would be the effect of said amendment upon the availability of said granted lands to accomplish the object for which the same was made.

That a large portion of, to-wit, not less than 30 per cent of the lands embraced in said grant, were at the time of said grant, and still are, broken, barren, volcanic rock, devoid of vegetation and of no value for any purpose. That with the exception of not to exceed 5,000 acres of the 105,120.11 acres embraced in the grant, none of said lands were available for sale in quarter-section tracts to single purchasers. That the remainder of said lands were so densely covered with a heavy growth of trees that the same were incapable of settlement or occupancy, and unfit for agricultural purposes; that to remove the timber from said land, a large portion of which was steep, rugged and broken, would cost many times more than the said land,

when cleared, would be worth. That the timber growing on said lands at the time of the passage of said act, and for many years thereafter, had no market value whatever. That the design of Congress in making the said grant was to provide for the building of said road from Roseburg to Coos Bay, and it was intended that the said lands should be sold to aid in such construction of said road within the time limited by said act for such construction; that the effect of the said proviso limiting the selling of said lands to 160 acres to one individual was to prevent the disposition of said lands for the purpose for which said grant was made. That said conditions were unknown to the members of said Congress when said amendment was adopted and said proviso made a part of said act. That through want of knowledge of said conditions, the said Congress was not advised that the effect of said amendment would be to prevent the sale or use of said lands for the purpose intended by said grant. That Congress being wholly without knowledge of the character and condition of said lands, adopted said proviso and thereby attached to said act a condition which wholly defeated the object for which the said act was passed. That said proviso was and is repugnant to the said grant and was and is wholly void.

#### XXIX.

Further answering herein, the defendant avers and says: That it is a bona fide purchaser in good faith and for full value of the lands described



in the Bill as belonging to it, the said defendant. That before purchasing, defendant carefully examined all legislation by Congress and by the State of Oregon affecting the title to said lands and made special inquiry concerning the same, and asked for and obtained the opinion of eminent counsel as to the said title and was advised that the title was clear and unincumbered. That before making said purchase the defendant carefully examined the patents for said land in said Bill described as numbered 1, 2, 3 and 4 and found that the same in all respects conformed to the requirements of said Act approved June 18, 1874, and conveyed the title to the lands described therein to the said Coos Bay Wagon Road Company in fee simple, free and clear of any and all conditions in said Act approved March 3, 1869, contained. That upon further inquiry made in good faith before purchasing said land, defendant found and avers the fact to be that on the 6th day of December, 1873, the said Coos Bay Wagon Road Company sold and by deed in due form conveyed to one J. M. Eberlein 760 acres of said granted lands in one body in fee simple, without condition, which deed was duly recorded in records of Coos County, Book 3 of Deeds, at page 333. That afterwards, and on the 8th day of February, 1875, the said Coos Bay Wagon Road Company sold and by deed duly conveyed to one Thomas J. Beale 1,120 acres of said granted land in one body, in fee simple, without conditions, which deed was duly recorded in



the records of Coos County in Book of Deeds No. 6, at page 172. That said deeds so recorded carried notice to all persons, including complainant, that said Coos Bay Wagon Road Company was selling and disposing of these lands to a single purchaser in greater quantities than 160 acres. That before making said purchase said defendant further prosecuted its search into the validity of the title to said lands and the right of the said Coos Bay Wagon Road Company to sell the same free and clear of the conditions contained in said Act approved March 3, 1869, relating to the limitation of such sales to one-quarter section only to any one purchaser, found and avers the fact to be as follows:

1st. That on the 3d day of March, 1869, Congress by an act approved on that date granted to the State of Oregon certain land in said act mentioned for the uses and purposes and upon the terms and conditions therein expressed, which act is set forth in full in Plaintiff's Bill, to which for greater particularity reference is hereby made.

2d. That without any of the terms or conditions whatever of said Act of March 3, 1869, having been performed by the State of Oregon, and without any specific direction from the Congress of the United States so to do, the Legislative Assembly of the State of Oregon, by an Act approved the 22d day of October, 1870, granted all the lands embraced in said grant to the State of Oregon, to the Coos Bay Wagon Road Company.

3d. That in pursuance of such Act of the Legislative Assembly approved October 22, 1870, said Coos Bay Wagon Road Company accepted said grant, and prior to the 3d day of March, 1874, completed the wagon road, to aid in the construction of which said Act of March 3, 1869, was passed, and the completion thereof was duly certified by the Governor of the State of Oregon to the Secretary of the Interior, as provided in and required by the said Act of March 3, 1869.

4th. That after the completion of certain sections of ten miles of said road, and its completion certified to the Secretary of the Interior by the Governor of Oregon, as in said Act of March 3, 1869, provided, the said Coos Bay Wagon Road Company sold all of the said lands for which purchasers could be found willing to purchase in quantities of not to exceed one-quarter section, and that the total so sold and conveyed amounted to about 5,000 acres, and no more, a schedule of which is set out in full in the Bill, to which for greater particularity reference is hereby made.

5th. That on the 6th day of December, 1873, said Coos Bay Wagon Road Company sold and conveyed 760 acres of said granted land in one body to one J. H. Eberlein, and on the 8th day of February, 1875, said company sold and conveyed 1,120 acres of said granted land to one Thos. J. Beale, as hereinbefore more particularly set forth.

6th. That on the 31st day of May, 1875, the said Coos Bay Wagon Road Company, claiming

to be the owner in fee simple of all the lands embraced in said Act of Congress approved March 3, 1869, entered into a contract with one John Miller for the sale thereof in one body of all of said grant not theretofore disposed of, as will more fully appear by a copy of said contract attached to and made a part of the Bill and marked Exhibit "B."

That among other things it was provided by said contract that said Coos Bay Wagon Road Company should without delay convey to said John Miller all of the lands embraced in said grant and then unsold for which the said Coos Bay Wagon Road Company then held patents, or a patent, and that whenever thereafter patents for the remaining portion of said grant should issue and be delivered to said Coos Bay Wagon Road Company said company would convey the same to said Miller, or his assigns. That the total amount of said grant on said 31st day of May, 1875, unsold, patented and unpatented, was about 96,676.96 acres, of which 42,496.93 acres had been patented, leaving yet to be patented approximately 62,633 acres. That of this said 42,496.93 acres patented as aforesaid about 6,963 acres had been sold, leaving then in the hands of said company patented and unsold about 35,533.93 acres, which on said 31st day of May, 1875, said Coos Bay Wagon Road Company conveyed by deed in fee simple to said Miller. That portions of the land embraced in said deed are situate in the Counties of Douglas and Coos, respectively, and the said deeds were duly recorded in the Rec-



ords of Deeds of said counties in which said lands severally lie, to-wit, in the County of Douglas in Book of Deeds No. . . , at page . . , and in the County of Coos in Book of Deeds No. . . , at page . . .

That afterwards, to-wit, on the several days and dates hereinafter set forth, in pursuance of the provisions and requirements of said Act of Congress approved the 18th day of June, 1874, the United States, the plaintiff herein, caused to be issued and delivered to the said Coos Bay Wagon Road Company patents for the portion of said land grant theretofore unpatented, as follows:

March 13, 1876, Patent No. 2 for 1,080 acres.

November 8, 1876, Patent No. 3 for 61,111.53 acres.

February 17, 1877, Patent No. 4 for 431.65 acres.

8th. That said contract of May 31, 1875, between said Coos Bay Wagon Road Company and said John Miller provides, among other things, in substance, that said company should forthwith convey to said Miller all that portion of said granted land which had theretofore been patented to said company and not then otherwise disposed of, and should also convey the remainder of said granted lands to said Miller, or his assigns, as soon as practicable after patents therefor were issued and delivered to the said company. The actual and agreed price to be paid for all of said lands was one dollar per acre. That said deed of the said Coos Bay Wagon Road Company to said John Miller of May 31, 1875, embraced thirty-



five thousand five hundred and thirty-four acres (35,534), for which said Miller then and there paid said company the sum of \$35,524.

That afterwards and on the 22d day of June, 1875, the said John Miller conveyed by deed duly executed to Collis P. Huntington, Charles Crocker, Leland Stanford and Mark Hopkins all the land embraced in said deed of May 31, 1875, by the Coos Bay Wagon Road Company to said Miller, and also said Coos Bay Wagon Road.

Said deed for said wagon road was recorded in Vol. 5 of Deeds, at pages 379 to 382, inclusive, and said deed for said land was recorded in Vol. 5 of Deeds, at pages 365 to 378 of the records in the Recorder's office of said Coos County.

9th. That immediately on the acceptance of the said last-named patents on or about the month of ....., 1877, said Coos Bay Wagon Road Company notified the said grantee of the said Miller, to-wit, Huntington, Crocker, Stanford and Hopkins, of the receipt thereof and offered to convey the land embraced therein to said Huntington, Crocker, Stanford and Hopkins upon payment to said company of \$1 per acre therefor. That the said Huntington, Crocker, Stanford and Hopkins refused to accept a conveyance of said land and pay \$1 per acre therefor, and the said Coos Bay Wagon Road Company insisted upon their said contract, and being unwilling to retain the said last-named lands in place of the price of \$1 per acre due therefor under said contract of May 31,

1875, with Miller aforesaid, and claiming that the sale of the whole of the said lands patented and unpatented to said Miller under said contract of May 31 constituted but one transaction, and the better to secure the payment of the remainder of the purchase price agreed upon by said contract of May 31, 1875, commenced a suit in the Circuit Court of the State of Oregon for the County of Coos against Charles Crocker, who had then become the assignee of the said Huntington, Crocker, Stanford and Hopkins, the grantees of a portion of the said granted land as hereinbefore stated, praying that as a further security for the balance of the purchase money under said contract of May 31, 1875, an order be entered by the said court in said cause, subjecting the whole of the lands so conveyed by said Miller to said defendants to a vendor's lien in favor of the plaintiff in said suit, as prayed in the Bill of Complaint filed therein.

That said suit was resisted by said defendants, and upon their, the defendants', motion, said cause was transferred to the Circuit Court of the United States for the District of Oregon, and was duly entered in the docket of said court on the 5th day of November, 1877.

That thereafter such proceedings were had in said cause that on, to-wit, the 22d day of November, 1880, a decree was entered in the records of said court allowing the prayer of the plaintiff therein and subjecting the said lands to a ven-

dor's lien in favor of the plaintiff as further security for the balance of the purchase price of said lands sold by said Coos Bay Wagon Road Company to said John Miller.

10th. That on the 27th day of March, 1882, said Collis P. Huntington and wife, Leland Stanford and wife, Mary Frances Sherwood Hopkins, as sole heir of Mark Hopkins, deceased, conveyed to Charles Crocker, by deed in fee simple, all the interest of said Huntington, Stanford and Hopkins in and to the said land conveyed by said John Miller to said Huntington, Crocker, Stanford and Hopkins by deed dated June 22, 1875, by which deed the entire fee simple title to said land was conveyed to and vested in said Charles Crocker.

11th. That on the 20th day of December, 1883, Charles Crocker having then become the sole owner of all that portion of the said land granted to the State of Oregon by said Act of March 3, 1869, and embraced in said deed of the said Coos Bay Wagon Road Company to John Miller, dated May 31, 1875, and said deed of John Miller to said Huntington, Crocker, Stanford and Hopkins, dated the 22d day of June, 1875, conveyed the same in fee simple to William H. Besse.

12th. That on, to-wit, the 29th day of December, 1883, said William H. Besse conveyed said described lands to one Russel Gray in fee simple.

13th. That on, to-wit, the 5th day of January, 1884, said Russel Gray conveyed the same premises



by deed in fee simple to the Oregon Southern Improvement Company, a corporation.

14th. That on, to-wit, the 7th day of January, 1884, the Coos Bay Wagon Road Company conveyed by deed in fee simple to William H. Besse all of the lands embraced in said Patents Nos. 2, 3 and 4.

15th. That on, to-wit, the 4th day of January, 1884, said William H. Besse conveyed by deed in fee simple all of the said land embraced in said deed of the Coos Bay Wagon Road Company to said Besse, dated January 7, 1884, to the said Oregon Southern Improvement Company.

16th. That on, to-wit, the 8th day of March, 1884, the said Oregon Southern Improvement Company executed and delivered to the Boston Safe Deposit & Trust Company a deed of trust or mortgage of all the property then owned or thereafter to be acquired, including the lands granted to the State of Oregon by said Act of March 3, 1869. That said deed of trust was, for convenience, dated January 1, 1884.

17th. That on, to-wit, the 1st day of May, 1885, the said Oregon Southern Improvement Company executed and delivered to the Boston Safe Deposit & Trust Company a further deed of trust or mortgage of like tenor and effect as that last described.

18th. That about the 9th day of December, 1886, said Boston Safe Deposit & Trust Company was succeeded as trustee of said mortgages or deeds of trust by William H. Rotch and Edward D. Mandell, and that on, to-wit, the 28th day of



December, 1886, suit was begun in the Circuit Court of the United States for the District of Oregon to foreclose said mortgages or deeds of trust, and such proceedings were had in said court in the matter of said foreclosure that a decree was made and entered therein on the 11th day of April, 1887, that said mortgages be foreclosed and that said Oregon Southern Improvement Company pay to said trustees within ten days \$1,516,666.66, and in default of said payment all the interest of the said Oregon Southern Improvement Company in the property covered by said decree be sold as upon execution based upon a judgment at law, which property included all the lands belonging to the Oregon Southern Improvement Company as aforesaid.

**That** said Oregon Southern Improvement Company made default and failed to comply with or perform the requirements of said decree, and in consequence of such default on, to-wit, the 23d day of June, 1887, all the interest of the said Oregon Southern Improvement Company was sold by George H. Durham, master of the court, to William J. Rotch and William W. Crapo, which sale was duly confirmed by said court. That thereafter, to-wit, the 16th day of November, 1887, said George H. Durham, master as aforesaid, executed and delivered to said Rotch and Crapo a master's deed of conveyance, whereby all the interest of the said Oregon Southern Improvement Company was conveyed to and vested in said Rotch and Crapo.

That the interest of the said Oregon Southern Improvement Company in and to the lands so conveyed to said Rotch and Crapo was the unconditional fee simple title, as shown by the several deeds of the grantors constituting the chain of title of said company to said lands.

19th. That on, to-wit, 14th day of December, 1887, said Rotch and Crapo conveyed by deed in fee simple and without condition all of the said land so purchased by the said Rotch and Crapo at said master's sale to this defendant.

That said conveyance was made by said Rotch and Crapo to this defendant in good faith and for full value, and this defendant purchased the same in good faith and without notice that the title so purchased was not what it purported to be, viz., a fee simple unconditional estate, and this defendant paid therefor the full value of all said property.

That the several deeds hereinbefore referred to were duly recorded at the time and place in the Plaintiff's Bill specifically set out, reference to which is hereby made for greater particularity.

That the plaintiff had actual and constructive notice of each and every of the transactions hereinbefore set forth at the time when the same occurred.

That on December 20, 1883, when the said William H. Besse purchased said property from Charles Crocker, he, said Besse, purchased the same in good faith and paid therefor the full market price, and had no notice of any defect or claim of

defect in the title, and had no notice of the alleged condition in said Act of March 3, 1869, or that there was any limitation or claim of limitation upon the alienation of said property, and was a bona fide purchaser in good faith for full value and without notice.

That to the best knowledge and belief of this defendant, Russel Gray never had any real interest in said property, but for some reason unknown to defendant said Gray took the legal title, as shown by the record, but solely for the use and benefit of the Oregon Southern Improvement Company, to whom he transferred the said land and property on January 5, 1884, as herein set out. That neither on December 20, 1883, nor on said January 5, 1884, nor at any time, or at all, did the Oregon Southern Improvement Company have any notice or knowledge of any claim of defect in the title to said property or any limitation on the right to transfer of title, or of the pretended condition in said Act of March 3, 1869, or that there was any limitation as to the alienation of said property. And defendant says that said Oregon Southern Improvement Company at the time it took title to said property was a bona fide purchaser in good faith, for full value and without notice.

That in all dealings with said granted lands from and including the year 1870 to and including the 14th day of December, 1887, on which last-named date the defendant herein acquired the title to the lands involved in this suit, the transactions



in each instance were open to the notice of all persons whomsoever, and all said lands were considered and treated by the several sellers and by the purchasers thereof as the property of each in the order of the conveyance, each claiming and honestly believing that he or it held the unconditional fee simple title thereto, and the defendant honestly believing that such title was being acquired, purchased the said land in the open market, bona fide and in good faith, and paid full value therefor, and under such purchase still holds the same.

That the dealings with said land as aforesaid extend through a period of thirty-eight years to the date of the commencement of this suit.

That during all of said term taxes, duly levied by the authority of the State of Oregon upon said lands, were duly paid by the holders of the title thereto, amounting in the aggregate up to the year 1909 to the sum of \$172,343.49.

That this defendant has not paid the taxes for 1909 to 1912 because of the bringing of this suit, and your orator alleges that such taxes amount to \$99,752.62.

And this defendant, under an arrangement with the County Court of Coos County, Oregon, has deposited said amount in the shape of a certified check with the Clerk of Coos County, Oregon, to provide for the payment of said taxes in the event that defendant's title be confirmed, the said check to be delivered to the proper officers of said Coos County upon said determination.



That all and each of the sales and purchases of said land hereinbefore mentioned were public and all deeds conveying the same were duly recorded in the public records of the counties where the lands lay, and were notice to all the world, including the United States, the plaintiff herein, of their several contents and of the character and extent of the claim of interest of the several holders therein.

That at the time said Act approved March 3, 1869, was passed, no direct means of connection existed between the navigable waters of Coos Bay on the west side of the Coast range of mountains, and Roseburg in the Umpqua Valley, on the east side of the Coast range, a distance of about sixty miles. That United States mails could be carried from one of said points to the other only by a circuitous and difficult journey by way of the Valley of the Umpqua by pack train to Scottsburg, at the mouth of said Umpqua River, thence by small boats and pack train to said Coos Bay, a distance of one hundred miles, at a great expense and loss of time, or by the more circuitous, expensive and slow route either north by stage to Portland and thence by the Columbia River and Pacific Ocean by steamer to Coos Bay, a distance of not less than 500 miles and consuming not less than ten days of time, or south by stage from Roseburg to San Francisco and up the Pacific Coast by steamer, a distance of not less than 1,500 miles, to Coos Bay, and consuming not less than fifteen days' time, all at an

enormous expense to the United States. That property and troops of the United States could be transferred between said points by the last-named routes only. That in order to avoid this condition and to expedite the means of communication between said points, to reduce the time required for the service and to greatly diminish the expense thereof, and to supply the great and pressing need of the Government, Congress passed the said Act approved March 3, 1869. That, acting in good faith and with the least delay possible and within the time required by said act, said military wagon road was completed in all respects as required by said act. That notwithstanding the route of the road lay over the very rough and rugged Coast range of mountains and its construction was extremely difficult and expensive, an excellent highway was constructed as aforesaid between said points.

It is provided, among other things, by the second section of said Act of March 3, 1869, "and said road shall be and remain a public highway for the use of the Government of the United States, free from all tolls or other charges upon the transportation of any property, troops or mails of the United States."

By the completion of said road, the distance the property, troops and mails of the United States had to be carried to reach one of said points from the other was reduced from many hundred miles to not to exceed sixty miles, and the expense and time required were correspondingly reduced.

The Government of the United States availed itself of the use of said wagon road immediately on its completion and has continuously used the same without charge for transportation of its property, troops and mails for a term of more than thirty-nine years, and still continues so to use and enjoy the same without tolls or other charges.

That the said use has been of great financial advantage to the United States during all of said time, not only in the saving of time required to make the journey, but in the reduced price for which the mail-carrying service especially has been performed, the amount of such saving, though many thousands of dollars, the defendant is unable to state the exact amount. A like saving has been made in the time, cost of transportation of property and troops of the United States over said road, the amount of which defendant is unable to state.

And this defendant, further answering Complainant's Bill, says: The grant of lands made by the Act of March 3, 1869, was a grant *in presenti* and made to the State of Oregon, a sovereign state, and upon the completion of said road took effect as of date March 3, 1869. That the clause in said act, to-wit, "That the grant of lands hereby made shall be upon condition that the lands shall be sold to any one person only in quantities not greater than one quarter section and for a price not exceeding \$2.50 per acre," did not create or constitute a condition subsequent in said grant.

That said proviso is merely a non-enforceable



direction or request as to the future disposition of said lands and was waived and abandoned by the United States by the Act of June 18, 1874, pleaded in the Bill, and by the issue in pursuance of said act of said patents to the Coos Bay Wagon Road Company, of date February 12, 1875, March 18, 1876, November 8, 1876, and February 17, 1877, hereinbefore referred to.

That by the issuance of said patents the complainant ratified and approved the Act of the Legislative Assembly of the State of Oregon of October 22, 1870, pleaded in the Bill, by which act the State of Oregon granted all said lands in one body to the Coos Bay Wagon Road Company.

That by said ratification complainant waived any right it might have had to claim that the provision of said Act of March 3, 1869, created a condition subsequent.

And this defendant, further answering the Bill of Complaint of complainant herein, alleges that on the 29th day of February, 1896, complainant brought its certain suit in this court against the Coos Bay Wagon Road Company, the Southern Oregon Company, T. R. Sheridan, R. S. Sheridan, J. P. Sheridan, Margaret Briggs, Ellen M. Rook and Mary A. Rook, defendants, in and by which Bill of Complaint this complainant alleged the legislation set out in Complainant's Bill in the present suit and prayed for the cancellation of the patents described in Complainant's Bill as Patents No. 3 and No. 4.



That on the 25th day of May, 1896, the defendants in said suit filed a general demurrer to the complaint therein, and on the 12th day of January, 1897, this court sustained the said demurrer; and on June 21, 1897, the defendants refusing to plead further, this court dismissed complainant's said complaint and entered judgment against complainant and in favor of defendants.

And defendant, further answering, says that on the 29th day of February, 1896, complainant herein brought its certain suit in this court against this defendant, the Coos Bay Wagon Road Company, Lorenz Vogel, Mathias Vogel, John Vogel, W. S. Hamilton, Mary Moak, Charlotte H. Elliott, Frederick Elliott, John Weaver, John Norman and C. C. Bonebrake, in which suit complainant pleaded the said Acts of Congress of March 3, 1869, and June 18, 1874, and said Act of the Legislature of the State of Oregon of October 22, 1870, and the various matters set up in Complainant's Bill herein, and prayed a cancellation of the Patent No. 1 described in Complainant's Bill and a forfeiture of the lands thereby patented to the Coos Bay Wagon Road Company. That all the defendants answered in said case, controverting the claims of the Government, and complainant, on May 25, 1897, filed a replication to defendants' answers, to which replication defendants demurred; and on June 3, 1897, said demurrer was sustained and Complainant's Bill dismissed and judgment entered for defendants.

And this defendant, further answering, says that on the 25th day of August, 1897, this complainant brought its certain suit in this court against the Coos Bay Wagon Road Company, alleging all the said Acts of Congress and of the State of Oregon and praying for the forfeiture of certain lands described in the Bill and for judgment against the said Coos Bay Wagon Road Company. That such proceedings were had in said case that complainant obtained judgment against said Coos Bay Wagon Road Company on the 7th day of August, 1901, for \$1,099.59 and other relief specified in the decree entered on said August 7, 1901.

And defendant, further answering, says that on the 18th day of February, 1896, complainant brought its certain suit in this court against the Coos Bay Wagon Road Company and this defendant. That in its Bill of Complaint in said suit complainant alleged the said Acts of Congress and of the Legislature of the State of Oregon alleged in the complaint herein and prayed for a forfeiture of the lands patented to the Coos Bay Wagon Road Company by Patent No. 1, as described in the Bill of Complaint in this suit. That such proceedings were had in said suit that on June 21, 1897, this court dismissed Complainant's Bill and entered judgment for defendants.

This defendant says that as to all the lands contained in said Patents Nos. 1, 2, 3 and 4 described in Complainant's Bill of Complaint, said judgments and decrees in said several suits and

the proceedings had therein quieted the title to said lands as against all claims which the Government might have had up to that time with reference to said lands or the title thereto, and that said decisions are *res judicata* and that complainant is and forever ought to be held estopped to again litigate the title to said lands or any part of them described in said Patents, or any of them.

And defendant further alleges that on said February 27 and 29, 1896, and August 25, 1897, and February 18, 1896, the complainant was fully informed of all the facts set out in Complainant's Bill herein, and in neither one of the complaints in said suits was it alleged or pretended by complainant that the grant to the State of Oregon or the Coos Bay Wagon Road Company was one upon condition subsequent or that there had been a forfeiture for breach of condition.

And defendant prays in all things the same benefit and advantage from said orders, judgments and decrees as if the same had been set out in full in this answer, and prays the court to consider all the proceedings in each of said cases as if the same had been pleaded *in haec verba* herein.

And this defendant says that by the institution of said suits thus made part of this answer by reference to them, and the acquiescence by complainant in the decrees, orders and judgments herein pleaded, the United States fully and finally exercised and waived any and all rights it may have had to claim or assert forfeiture of any lands



described in either of said patents pleaded in Complainant's Bill or any lands granted by said Act of Congress of March 3, 1869, and is thereby estopped from having or asserting any such claim of forfeiture.

And this defendant, further answering said Bill, avers that this honorable court, sitting as a court of equity, is without jurisdiction to inquire or determine whether the defendant, the Southern Oregon Company, or the Coos Bay Wagon Road Company, mentioned in the Bill of Complaint herein, or both of said defendants, have or has committed the alleged breach or breaches of condition subsequent alleged by the Bill to be annexed to said grant of 1869, or to decree as prayed by said Bill the forfeiture to the United States of the said granted lands, or any portion thereof.

And this defendant further alleges that when said patents were issued to the Coos Bay Wagon Road Company they were issued in accordance with the terms of said Act of June 18, 1874, and not otherwise. That said Act of June 18, 1874, ratified the action of the State of Oregon in granting all said lands to one person without reference to the limitations of 160 acres contained in the Act of March 3, 1869, and by reason of the facts herein pleaded complainant is estopped now to say that the subsequent transfers were in violation of said act.

And defendant further alleges that by the compact between the state and the United States, the



management of local affairs, including the disposition of lands, is vested entirely in the several states, and the United States has no constitutional right to interfere with said management and control, and that this suit is therefore without equity and should be dismissed.

Wherefore, this defendant having fully answered, confessed, traversed and avoided or denied all the material matters in said Bill, according to its best knowledge, information and belief, prays that it may be hence dismissed with its reasonable costs and charges so unjustly sustained.

SOUTHERN OREGON COMPANY,

By Charles R. Smith, President.

DOLPH, MALLORY, SIMON & GEARIN,

Solicitors and Counsel for Defendant.

Due service accepted this 17th day of June, 1913.

B. D. TOWNSEND,

Special Assistant to the Attorney-General.

Filed June 17, 1913.

A. M. CANNON,

Clerk.

And afterwards, to wit, on the 28th day of August, 1914, there was duly filed in said Court, and afterwards on January 28, 1915, by order of the Court, there was duly refiled, a replication, in words and figures as follows, to wit:

REPLICATION.

*In the District Court of the United States for the  
District of Oregon.*

United States of America, Complainant,

vs.

In Equity

Southern Oregon Company, Defendant. No, 3701.

And now comes the United States of America, complainant in the above cause, and replying to the answer filed herein by the defendant Southern Oregon Company, says that, saving and reserving all manner of exceptions to the insufficiency of the answer, for replication thereto doth say that its bill is true and sufficient as averred, and that it is ready to prove it, and that the answer of the defendant Southern Oregon Company is untrue and insufficient.

Wherefore, it prays relief as set forth in its original bill.

JAMES C. McREYNOLDS,

Attorney General.

CLARENCE L. REAMES,

United States Attorney for the District of Oregon.

CONSTANTINE J. SMYTH,

FRED C. RABB,

Special Assistants to the Attorney General.

United States of America, State of Oregon, County of Multnomah.

We, the undersigned solicitors for the defendant Southern Oregon Company, do hereby consent to the filing of the foregoing replication and acknowledge receipt of a copy thereof.

DOLPH, MALLORY, SIMON & GEARIN,  
Solicitors for Defendant Southern Oregon Company.

Filed, August 28, 1914.

G. H. MARSH, Clerk.

Refiled, by order of court, January 28, 1915.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 12th day of July, 1915, there was duly filed in said Court an Opinion, in words and figures as follows, to wit:

OPINION.

NO. 3701.

*In the District Court of the United States for the  
District of Oregon.*

United States of America, Complainant,

vs.

Southern Oregon Company, Defendant.

Clarence L. Reames, United States Attorney.

Constantine J. Smyth and Fred C. Rabb, Special Assistants to the Attorney General.

Dolph, Mallory, Simon & Gearin, for the Defendant.

This is a suit on the part of the General Government to have forfeited to it substantially the entire

land grant made by Congress, of March 3, 1869, to the State of Oregon to aid in the construction of a military wagon road from Roseburg, in Douglas County, to Coos Bay, in Coos County. The grant is of the odd-numbered sections to the extent of three sections on each side of the line of the road, with indemnity limits of six miles. Among the provisions of the first section of the act are these:

“Provided, that the lands hereby granted shall be exclusively applied to the construction of said road and to no other purpose, and shall be disposed of only as the work progresses; Provided further, that the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section, and for a price not exceeding two dollars and fifty cents per acre.”

Section 2 provides that “The lands hereby granted to said state shall be disposed of by the legislature thereof for the purpose aforesaid, and for no other.”

Section 5 provides that when the Governor of the State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land granted, not to exceed 30 sections, may be sold, and so on from time to time, until said road shall be completed; completion being required within five years, with a further provision that, if not completed within that time, the lands remaining unsold shall revert to the United States.



Section 6 requires that the Surveyor General shall cause the lands granted "to be surveyed at the earliest practical period after said State shall have enacted the necessary legislation to carry this act into effect."

On October 22, 1870, the Legislative Assembly of the State of Oregon, by an act thereof, granted to the Coos Bay Wagon Road Company all lands, right of way privileges and immunities as granted to the State by the act aforesaid, "for the purpose of aiding said company in constructing the road mentioned and described, in said act of Congress, upon the conditions and limitations therein prescribed."

On June 18, 1874, Congress passed a supplemental act providing for the issuance of patents to the lands granted, to the State of Oregon, on compliance with the terms of the original act, unless the State "shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: Provided, that this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled."

The road was completed within the time limited, and in due course patents were issued by the General Government to the Coos Bay Wagon Road Company. Prior to May 31, 1875, the company sold divers

small tracts of the land, aggregating 6,963 acres, and on that date it entered into a contract with one John Miller to sell and convey to him 96,676.96 acres of the granted lands. In pursuance of the contract, the company conveyed to Miller, on the same date, 35,534 acres by deed, and the wagon road by another deed. Subsequently Miller conveyed to Collis P. Huntington, Charles Crocker, Leland Stanford and Mark Hopkins, and they later, by mesne conveyances, to Wm. H. Besse, who, on December 29, 1883, conveyed to Russell Gray, and he, in turn, on January 5, 1884, conveyed to the Oregon Southern Improvement Company, an Oregon corporation. In further pursuance of the Miller contract, the Road Company, on January 7, 1884, conveyed the remaining 61,143.37 acres to Wm. H. Besse, who, on June 4th following, conveyed to the Oregon Southern Improvement Company. The property was at about the same time conveyed by the Improvement Company by certain trust deeds to secure certain bonds, which deeds were later foreclosed, and the property sold at master's sale and conveyed to the Southern Oregon Company, the defendant, also an Oregon corporation.

Subsequent to May 31, 1875, 4,470 acres of the lands have been sold to individuals, namely, eight sales by the Road Company, six by Crocker, two by the Improvement Company, and fourteen by the defendant company. Other than these, no lands of the grant have been sold either in large or small tracts.

The testimony in the case indicates that the holders have, almost from the inception of the grant, evinced a purpose not to sell in quantities not exceeding 160 acres to any one person, or for a price not exceeding \$2.50 per acre. Indeed, the sales made by the Road Company, the patentee, are in derogation of the terms of the grant as it respects quantity, and the subsequent holders have steadily refused, with rare exceptions, to sell in compliance with the terms of the grant; and the defendant, the present holder, does now refuse so to dispose of the lands, claiming to be the owner of the entire fee simple interest therein, freed of any obligations whatsoever to the Government respecting them.

WOLVERTON, District Judge:

The Government is seeking a forfeiture of this grant, on the ground that the clause requiring the land to be sold in quantities not greater than 160 acres to any one person, and for a price not exceeding \$2.50 per acre, constitutes a condition subsequent, and that there has been a breach of the condition. The defendant insists that the proviso, alluding to this provision in the grant, is repugnant to the grant, because a limitation on the right of alienation, and therefore void. The position is sought to be substantiated by reason of the alleged fact that the lands could not be sold in 160 acre tracts for any price. The testimony does tend to show that, up to perhaps 15 years ago, there was slack sale for the lands in any quantities. It cannot be asserted, however, that since that time by far the



greater proportion of the granted lands could not have been sold in strict conformity with the provisions of the grant. The defendant company having declined and refused so to dispose of its lands, there has been a positive non-compliance with the letter of the grant.

These contentions, both of the Government and of the defendant, have been put to rest contrary to the views of counsel, by the Supreme Court, in the case of *United States v. Oregon & California Railroad Co., et al.* (Advance Sheets), originating in this court and involving the construction of similar provisions contained in grants of like character, in a very able and exhaustive opinion by Mr. Justice McKenna. The contention of the defendant there was in reality slightly different from that made here; it being that the provisos constituted restrictive and unenforceable covenants; but, for all practical purposes, it must be considered the same as here. At least, the reasoning and consideration of the Supreme Court reaches and disposes of both phases of the position advanced. I may be pardoned if I quote extensively from the opinion, for it seems to dispose of every aspect of the contentions stated.

“Congress, therefore,” says the court, “had under consideration remedies for violations of the provisions of the act and adjusted them according to what it considered the exigency. As a penalty for not completing the road as prescribed, Congress declared only for a reversion of the lands *not then patented*; for not maintaining it in repair and use



Congress reserved the right temporarily to sequester the road; and yet for a violation of the provision for sale to settlers it is urged that Congress condemned to forfeiture not only the lands then *unpatented but those patented*. Mark the difference. Was non-completion of the road of less consequence than settlement along its line?—not necessary complete settlement but any settlement—the refusal it might be, of the acceptance of a single offer of settlement or even, as it is contended, of making provision for settlement, being of greater consequence and denounced by more severe penalty than the declared conditions, that is, assent to the act, completion of the road, and its maintenance. This is difficult, if not impossible, to be believed.

“It appears, therefore, that the acts of Congress have no such certainty as to establish forfeiture of the grants as their sanction, nor necessity for it to secure the accomplishment of their purposes—either of the construction of the road or sale to actual settlers—and we think the principle must govern that conditions subsequent are not favored but are always strictly construed, and where there are doubts whether a clause be a covenant or condition the courts will incline against the latter construction; indeed, always construe clauses in deeds as covenants rather than as conditions, if it is possible to do so. 2 Washburn on Real Property, 4. And this because ‘they are clauses of contingency on the happening of which the estates granted may be defeated.’ And it is a general principle that a court

of equity is reluctant to (some authorities say never will) lend its aid to enforce a forfeiture.

“By this conclusion do we leave the provisos meaningless and the Government without remedy for their violation? There is no argument in a negative answer. From the defects of a provision we can deduce nothing nor on account of them substitute one of the greater efficacy.

“But must the answer be in the negative, and by rejecting the contention of the Government are we compelled to accept that of the railroad company?—or we may say those of the railroad company, for the contentions are many, some of which preclude the application of the provisos, some of which assert their invalidity and others limit their application.

“If not first in order, at least in more immediate connection with the contention of the Government is the contention that the provisos are not conditions subsequent but simple covenants, and, it is said, restrictive and negative only, and therefore not enforceable. In support of the contention all of the uncertainties or asserted uncertainties of the provisos are marshaled and amplified. \* \* \* And the conclusion is deduced that the actual settlers clauses, viewed even as covenants, were either impossible of performance or repugnant to the grants, and, therefore, void.

“The arraignments seems very formidable, but is it not entirely artificial? It is stipulated that prior to 1887 more than 163,000 acres of the granted lands were sold, nearly all of which were sold to

actual settlers, in small quantities. If the sale of 163,000 acres of land encountered no obstacle in the enumerated uncertainties we cannot be impressed with their power to obstruct the sale of the balance of the lands. The demonstration of the example would seem to need no addition. But passing the example, as it may be contended to have some explanation in the character of the lands so disposed of, the deduction from the asserted uncertainties is met and overcome by the provisos and their explicit direction. They are, it is true, cast in language of limitation and prohibition; the sales are to be made only to certain persons and not exceeding a specified maximum in quantities and prices. If the language may be said not to impose 'an affirmative obligation to people the country' it certainly imposes an obligation not to violate the limitations and prohibitions when sales were made, and it is the concession of one of the briefs that the obligation is enforceable, and that, even regarding the covenant as restrictive, the 'jurisdiction of a court of equity upon a breach or threatened breach of the covenant to enforce performance by enjoining a violation of the covenant cannot be doubted.' Opposite cases are cited to sustain the admission, and in answer to the contention of the Government that it could recover no damages for the breach, and hence had no enforceable remedy but forfeiture, it is said: 'But the jurisdiction of a court of equity in such cases does not depend upon the showing of damage. Indeed, the very fact that injury is of public character and such that no dam-



age could be calculated, is an added reason for the intervention of equity.' And cases are adduced. We concur in the reasoning and give it greater breadth in the case at bar than counsel do. They would confine it, or seem to do so, to the compulsion of sales of land susceptible of actual settlement, and assert that the evidence established that not all of the lands, nor indeed the greater part of them, have such susceptibility. But neither the provisos nor the other parts of the granting acts make a distinction between the lands, and we are unable to do so. The language of the grants and of the limitations upon them is general. We cannot attach exceptions to it. The evil of an attempt is manifest. The grants must be taken as they were given. Assent to them was required and made, and we cannot import a different measure of the requirement and the assent than the language of the act expresses. It is to be remembered the acts are laws as well as grants and must be given the exactness of laws.

"If the provisos were ignorantly adopted as they are asserted to have been; if the actual conditions were unknown, as is asserted; if but little of the land was arable, most of it covered with timber and valuable only for timber and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest; if its character was given evidence by the application of the Timber and Stone Act to the reserved lands; if settlers neither crowded before nor crowded after the railroad, nor could do so; if the grants were not



as valuable for sale or credit as they were supposed to have been and difficulties beset both uses, the remedy was obvious. Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law; they were neither cause nor justification for violating it. Besides, we may say that there is controversy about all of the asserted facts and conclusions.

“Our conclusions, then, on the contentions of the Government and the railroad company are that the provisos are not conditions subsequent; that they are covenants, and enforceable.”

What is there said is applicable here, and amply disposes of the contentions advanced without further reasoning or comment.

In this connection may be considered the further contention of the defendant that the grant was to the State of Oregon and in *praesenti*, and that compliance with the proviso was a matter of good faith only between the Government and the State. It will be remembered that, by the act of June 18, 1874, Congress recognized the right and power of the State to transfer its interests in said grant to any corporation or corporations, for it declared that in the event of such a transfer, patents should be issued to the corporation or corporations direct. The Legislative Assembly of the State, in making the transfer, did it “upon the conditions and limitations” prescribed in the grant. The State did not pretend to comply with the proviso, or any condition of the grant. These things the Road Company undertook to per-

form by its acceptance of the transfer, and was bound to their performance, the same as the State. But it is not conceivable that it was a matter of good faith merely with the State, to perform the covenants of the grant, any more than it was with the Road Company. The lands prior to the grant were a part of the public domain, and Congress was empowered to dispose of them to whom it pleased, and upon such conditions as it might impose. It could deal with a State in that regard, the same as with an individual or a private corporation, and, unless it evinced a different purpose in dealing with the State, there could be no different construction placed upon the grant. The obligation of the State for the observance of identical conditions would be the same as that of an individual or a corporation. The cases of *Mills County v. Railroad Companies*, 107 U. S. 557, and *Hagar v. Reclamation District*, 111 U. S. 701, have no application here. Those cases relate to the grant by the General Government of swamp lands to the State on condition that the proceeds of the lands, "Whether from sale or direct appropriation in kind," should be applied in reclaiming the lands, and the court held the appropriation of the proceeds rested solely in the good faith of the State. But here is a grant where the State or its grantee is required to dispose of the lands in a certain specified way, which is a direction of law, and nothing is left to the good faith of the State except to observe the obligations imposed upon it or its grantee by the acceptance of the grant.

It is next contended that the Government is estopped to assert a claim for forfeiture, mainly upon the ground that certain suits were in the past instituted, wherein it had the opportunity of setting up the nature of the grant and insisting upon the performance of the provision or covenant in question, and that, having failed to do so, it should not now be heard to insist upon such performance. The nature of the suits may be noticed briefly.

The first was instituted by the United States against the Road Company and the present defendant February 18, 1896, for the purpose of cancelling the Road Company's patent to the N. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of Section 9, Tp. 28 S., Range 7 W., because, it was alleged, the land was reserved by the terms of the grant. A demurrer was interposed to the bill, which was sustained, and the bill dismissed.

On February 29, 1896, the Government instituted another suit against the Road Company and the present defendant, and others, for the purpose of annulling the Road Company's patents to certain lands contained in an overlap of the grants to the Road Company and the Oregon & California Railroad Company. To this bill a demurrer was also interposed and sustained, and the bill dismissed, and the cause was not proceeded with further.

On the same day the Government instituted another suit against the Road Company, the Southern Oregon Company, Lorenz Vogl and others to cancel the patent of the Road Company to a certain tract of land because reserved from the grant, and



1,099.50 other acres of land because situated outside of the limits of the grant, and patented to the Road Company through oversight and mistake of the ministerial officers of the Land Office. The Road Company and the Southern Oregon Company answered the bill, the latter setting up a complete chain by which it claimed to deraign title from the Government under the grant, the manner of selecting the lands under the grant, the approval of the lists, and the issuance of the patents in pursuance thereof. It appears further that the Government filed a replication to the Road Company's answer. The reply was demurred to, and the demurrer sustained by the court, and, the Government refusing to plead further, on motion of the defendants the suit was dismissed. This is a novel procedure, of course, but such is the record, and the cause was thus disposed of.

Later, on August 25, 1897, the Government began another suit, against the Road Company, alone, touching the same matter, but demanded, as to the lands alleged to be outside of the limits of the grant that were patented to the Road Company, that the Government recover the value thereof to the amount of \$2.50 per acre. The suit resulted in a cancellation of the patent to the small tract alleged to have been reserved from the operation of the grant, and a decree against the defendant for \$1,099.59, the value of the lands patented alleged to be outside of the delimitation of the grant. While the prayer, among other things, prayed for a construction of the grant,



there was no construction of it by the court, other than to ascertain: First, that the small tract of land was reserved by the terms of the grant; and, second, that the other lands patented were outside the limits prescribed, and therefore, they having gone into other hands, that the Road Company should pay to the Government what it received therefor.

Upon strict legal principles, it cannot be maintained that any of these suits, or the disposition thereof, or the judgments or decrees rendered, are a bar or an estoppel against the prosecution of the present suit in any of its phases. It has been long settled that, when a second suit is upon the same cause of action and between the same parties, the judgment in the first is conclusive in the second as to every question which was or might have been presented or determined in the first; but when the second suit is upon a different cause of action, though between the same parties, the judgment in the former operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been presented and passed upon. In the latter contingency, the question must further appear upon the face of the record to have been so litigated, or shown by extrinsic evidence, and it is only when it so appears that the former judgment will operate as an estoppel to the subsequent suit or action.

*Cromwell v. County of Sac.*, 94 U. S. 351.

*Russell v. Place*, 94 U. S. 606.

Nesbit v. Riverside Independent District, 144 U. S. 510.

De Sollar v. Hanscome, 158 U. S. 216.

Northern Pacific Railway v. Slaughter, 205 U. S. 122.

Delaware, L. & W. R. Co. v. Kutter, 147 Fed. 51.

It cannot be said, first that this is the same cause of suit as any one of the suits above mentioned; and, second, although in each instance between the same parties, treating the defendant here as successor to the Road Company, that the question here sought to be litigated and determined, or any of them, were directly litigated and determined there. Nor does the case of *United States v. California and Oregon Land Co.*, 192 U. S. 355, help the defendant. The purpose of that case was to have certain patents for land declared void as forfeited, and to establish title in the United States. The suit having failed, it was held to constitute a bar to a subsequent bill brought against the same defendant to recover the same land on the ground that it was excepted from the original grant as being a part of an Indian reservation. In commenting upon the lack of distinction between the two suits, Mr. Justice Holmes said:

“The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means, that is to say, by evidence

that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee."

In none of the cases relied upon was it attempted to establish the Government's title in any of the lands now in dispute, nor was it attempted in any way to require the defendant to observe the exact provisions of the grant, as is now sought to be done, so that I am clear that there is no estoppel by reason of any judgment or decree rendered in any of those cases.

But it is further urged that the Government ought to be estopped by reason of having full knowledge of the manner in which the several parties were treating their holdings of these lands (that is, as though they were the owners in fee simple, with absolute title unincumbered by any provision of law or covenant impairing the validity of their title in any way), and that the Government has not, through all these years, at any time insisted upon any breach of any alleged condition subsequent, or of any covenant respecting the grant. A complete answer to this is the one given by the Supreme Court to a like contention, and others of a similar nature, made in the case of *United States v. Oregon & California Railroad Company, et al.*, *supra*, as follows:

"We may observe again that the acts of Congress are laws as well as grants and have the constancy of laws as well as their command and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the

railroad company based on waiver, acquiescence and estoppel and even to the defenses of laches and the statute of limitations.”

One other point is presented, and that is, that the defendant is an innocent purchaser, in good faith and for value. But this cannot be, so long as the provision about which the entire case hinges is a covenant pertaining to the grant itself. The grant having the force of law, every purchaser dealing with the grant, as the parties succeeding to the title and rights and privileges of the State have dealt with it, must be charged with full knowledge of all of the provisions of the grant, and cannot therefore claim as innocent purchasers.

The decree in this case will be the same as in the Oregon & California Land Grant Case, namely, that the defendant be enjoined from sales of any of these lands in violation of the covenant, and also from any disposition of them whatever, or of the timber therein, or from cutting or authorizing to be cut or removed any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendant all the value that the granting act conferred upon the State or the Road Company. In case Congress makes no such provision within eight months,



the defendant may apply to the court for such modification of the injunction as may seem appropriate.

The plaintiff is entitled to its costs and disbursements.

Filed, July 12, 1915.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 28th day of July, 1915, there was duly filed in said Court a Petition for Rehearing, in words and figures as follows, to wit :

PETITION FOR REHEARING.

*In the District Court of the United States for the  
District of Oregon.*

United States of America, Complainant,

vs.

Southern Oregon Company, Defendant.

Now comes the defendant by its attorneys, Dolph, Mallory, Simon & Gearin, and moves the court for rehearing in the above entitled suit upon the following grounds :

1. The court erred in not holding that the defendant was a bona fide purchaser and took the title as such free from any alleged imperfections because of the proviso contained in the grant.

2. The court erred in not holding that the Government is estopped by the record of prior suits as shown by Exhibits 240, 241, 242, and 243.

3. The court erred in not holding that the grant of lands being made to the State, the sovereignty of the State attached, and the Government could not follow the same.

210 *United States vs. Southern Oregon Company*

4. The court erred in not dismissing complainant's bill and awarding defendant judgment for costs.

5. The court erred in awarding costs to complainant.

DOLPH, MALLORY, SIMON & GEARIN,  
Attorneys for Defendant.

Filed, July 28, 1915.

G. H. MARSH, Clerk.

And afterwards, to wit, on Tuesday, the 7th day of December, 1915, the same being the 32nd judicial day of the regular November, 1915, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

FINAL DECREE.

*In the District Court of the United States for the  
District of Oregon.*

United States of America, Complainant,

vs.

No. 3701.

Southern Oregon Company, Defendant.

This cause having come on to be heard upon the pleadings and the evidence, was argued and submitted by counsel for the respective parties, and the court being now fully advised in the premises, orders, adjudges and decrees as follows:

1. That the defendant and its officers and agents be and each is hereby enjoined from selling the lands

or any part thereof, or any of the timber thereon, granted by the Act of Congress, approved March 3, 1869, and described in Exhibit H attached to the Bill of Complaint in this case, in quantities greater than one-quarter section to one person, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found, and from cutting or removing, or authorizing the cutting or removal of any of the timber thereon, or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

2. That the defendant and its officers and agents be, and each is, hereby enjoined, from making or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof or of the timber thereon, or any part thereof; or of any mineral or other deposits therein; from cutting, removing or authorizing the cutting or removal of the timber thereon or any part thereof; and from removing or authorizing the removal of mineral or other deposits therein, until Congress shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, mineral or other deposits, in accordance with such policy as Congress may deem fitting under the circumstances and at the same time secure to the de-

pendant all the value that the granting act conferred upon the State of Oregon, or the Wagon Road Company.

3. That if Congress does not make provision for the disposition as aforesaid of said lands, timber, mineral or other deposits the defendant may apply to the court within a reasonable time, but not less than eight months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of said lands or money, timber, mineral or deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to modify this decree in that regard, if, in its opinion, good cause shall then exist for doing so.

4. That the complainant have and recover from the defendant, Southern Oregon Company, its lawful costs and disbursements herein, taxed at \$. . . . . and that execution issue therefor.

5. That the complainant shall have the right to apply to the court at any time hereafter for an accounting as to all moneys received by the defendant from or on account of the lands covered by said granting act, and the court retains jurisdiction over the action for the purpose of granting such application if good cause therefor appears.

Done in open court this 7th day of December, 1915.

BY THE COURT,

CHAS. E. WOLVERTON,

Judge.

Filed, December 7, 1915.

G. H. MARSH, Clerk.



And afterwards, to wit, on the 9th day of December, 1915, there was duly filed in said Court, a Petition for Appeal, and Order Allowing Appeal, in words and figures as follows, to wit:

PETITION FOR APPEAL. ORDER ALLOWING  
APPEAL.

*In the District Court of the United States for the  
District of Oregon.*

United States of America, Complainant,

vs.

No. 3701.

Southern Oregon Company, Defendant.

The above named defendant, conceiving itself aggrieved by the decree made and entered on the 7th day of December, 1915, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which are filed herewith, and it prays that this appeal may be allowed and than a transcript of the records, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

DOLPH, MALLORY, SIMON & GEARIN,  
Solicitors and Attorneys for Defendant.

The within petition for allowance of appeal is granted and said appeal is allowed as prayed, upon the giving of a bond in the sum of \$2,500, to be approved by this court, which bond shall operate as supersedeas from the date of its approval, except

as to the injunctive portion of said decree. Dated this 9th day of December, 1915.

CHAS. E. WOLVERTON,  
Judge.

District of Oregon, County of Multnomah, ss.

Due service of the within petition for appeal is hereby accepted in Multnomah County, Oregon, this 9th day of December, 1915, by receiving a copy thereof duly certified to.

C. J. SMYTH,  
Special Assistant to the Attorney General.  
Filed, December 9, 1915.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 9th day of December, 1915, there was duly filed in said Court, an Assignment of Errors, in words and figures as follows, to wit:

#### ASSIGNMENT OF ERRORS.

*In the District Court of the United States for the  
District of Oregon.*

United States of America, Complainant,

vs.

No. 3701.

Southern Oregon Company, Defendant.

The defendant, the Southern Oregon Company, complains of errors in the proceedings in this case in the District Court of the United States for the District of Oregon, in the above entitled cause and in the decision and decree rendered, made and entered therein and assigns the following as the errors complained of:

1st. The court erred in holding that the United States, complainant herein, was entitled to the relief decreed it in and by said decree entered December 7, 1915, or to any relief and in not holding that the said complaint of said complainant should be dismissed.

2nd. The court erred in holding that the complainant had any right, title or interest in or to the lands described in the complaint herein, or any part thereof.

3rd. The court erred in holding that the allegations in said Bill of Complaint were sustained by the evidence and in not holding that said complaint should be dismissed.

4th. The court erred in holding that complainant was entitled to recover its costs and disbursements, or that a decree should be entered to that effect.

5th. The court erred in holding that the complainant herein was or is entitled to any injunction or restraining order in this cause.

6th. The court erred in holding that the defendant and its officers and agents be enjoined from selling the lands, or any part thereof, or any of the timber thereon, granted by the Act of Congress, approved March 3, 1869, and described in Exhibit H, attached to the Bill of Complaint in this case, in quantities greater than one-fourth sections to one person, or for a price exceeding \$2.50 per acre.

7th. The court erred in holding that the defendant should be enjoined and in enjoining the defend-

ant from selling any of the timber on said lands, or any mineral, or other deposits therein, except as part of and in conjunction with the land on which the timber stands, or in which the metal or other deposits are found, and in enjoining the defendant from cutting or removing, or authorizing the cutting or removal of any of the timber thereon, and in enjoining the defendant from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

8th. The said court erred in holding and directing that the defendant and (or) its officers and (or) agents be enjoined from making, or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands, or of any part thereof, or of the timber thereon, or of any part thereof, or of any mineral or other deposit therein, or from cutting, removing, or authorizing the cutting or removal of the timber thereon or of any part thereof, or from removing or authorizing the removal of mineral or other deposits therein until Congress shall have reasonable opportunity or any opportunity to make provision by legislation for the disposition of said lands, timber, mineral or other deposits, or up to any time.

9th. The court erred in holding that this defendant should be enjoined from so disposing of any of said properties, except in accordance with such



policy as Congress may deem fitting under the circumstances, or at all.

10th. The said court erred in issuing any injunction whatever in this case.

11th. The court erred in holding and decreeing that the plaintiff shall have the right to apply to the court at any time hereafter for an accounting as to all moneys received by the defendant from or on account of the lands covered by said granting Act, and the said court erred in retaining jurisdiction in the action for the purpose of granting such application, or any accounting.

12th. The court erred in not holding that the plaintiff is estopped to now urge the forfeiture of title for breach of condition, or to demand an injunction against this defendant, enjoining this defendant from in any manner dealing with said lands as the lands exclusively of this defendant, and that the Government is so estopped by reason of the four suits heretofore brought by the Government against the Southern Oregon Company and Coos Bay Wagon Road Co., et al., as shown in the Judgment Rolls, being Exhibits 240, 241, 242, and 243, introduced in evidence and a part of the records in this case.

13th. The said court erred in not holding and decreeing that the Southern Oregon Company, this defendant, is a bona fide purchaser of the land described in the Bill of Complaint herein.

14th. The said court erred in not holding that the proviso in the first section of the Act pleaded in

the Bill of Complaint is obnoxious to the grant and therefore void.

15th. The said court erred in not holding that the complainant has no constitutional power to follow the grant in this case, which was made to the State of Oregon after the State of Oregon had transferred the lands and all its rights under the grant to the Coos Bay Wagon Road Company.

16th. The said court erred in not holding and decreeing that the defendant is the legal and equitable owner in fee simple of all the lands described in the Bill of Complaint, and in not holding and decreeing that the complainant has no right or title in or to any of said lands.

Wherefore, this defendant, Southern Oregon Company, prays that the said decree herein be reversed and that this court enter a decree in accordance with the prayer of the answer and amendments thereto of this defendant filed herein and adjudging that the Bill of Complaint herein be dismissed, and for such other, further, and different relief as to this court may seem just and equitable in the premises.

DOLPH, MALLORY, SIMON & GEARIN,  
Solicitors and Attorneys for Defendant Southern  
Oregon Company.

State of Oregon, County of Multnomah, ss.

Due and legal service of the within Assignment of Errors is hereby accepted in Multnomah County, Oregon, this 9th day of December, 1915, by receiv-

ing a true copy thereof, duly certified to as such by Jno. M. Gearin, attorney for defendant and appellant.

C. J. SMYTH,

Special Assistant to the Attorney General.

Filed, December 9, 1915.

G. H. MARSH, Clerk.

And afterwards, to wit on the 9th day of December, 1915, there was duly filed in said Court a Bond on Appeal, in words and figures as follows, to wit:

**BOND ON APPEAL.**

*In the District Court of the United States for the  
District of Oregon.*

United States of America, Complainant,

vs.

No. 3701.

Southern Oregon Company, Defendant.

Know all men by these presents, that we, Southern Oregon Company, as principal, and Maryland Casualty Company, of Baltimore, Maryland, a corporation, duly organized and existing under and by virtue of the laws of the State of Maryland, and as such corporation authorized to do business and doing business in the State of Oregon, as surety, are held and firmly bound unto the United States of America, the complainant in the above entitled action, in the sum of \$2,500, to be paid to the said United States of America, complainant herein, its attorneys, officers, or assigns, and for the payment of which sum well and truly to be made, we bind ourselves and each of us, and our and each of our

220 *United States vs. Southern Oregon Company*

successors, associates, heirs, executors, administrators and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 9th day of December, 1915.

The condition of the above obligation is such that

Whereas, the said defendant, the Southern Oregon Company, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and decree rendered and entered in the above entitled cause in favor of the United States of America, the said complainant, and against the said defendant, the Southern Oregon Company, on the 7th day of December, 1915, which said judgment and decree is hereby referred to and adopted as a part hereof.

Now therefore, the condition of the above obligation is such that if the said Southern Oregon Company shall prosecute said appeal to effect and answer all damages and costs if it fail to make the said appeal good, then the above obligation to be void, else to remain in full force and virtue.

MARYLAND CASUALTY COMPANY,

(Seal.)

By GEO. S. RODGERS,

Attorney.

Countersigned: CHAS. D. FISK, Attorney.

SOUTHERN OREGON COMPANY,

By JOSEPH SIMON,

Solicitor and Attorney for Defendant.



Examined and approved:

CHAS. E. WOLVERTON,

Judge.

Filed, December 9, 1915.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 4th day of March, 1916, there was duly filed in said Court, a Statement of the Evidence, in words and figures as follows, to wit:

STATEMENT OF THE EVIDENCE.

*In the District Court of the United States for the  
District of Oregon.*

United States of America, Complainant and Appellee,

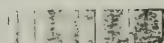
vs.

Southern Oregon Company, Defendant and Appellant.

STATEMENT OF THE EVIDENCE.

Prepared and tendered by appellant under Rule 75, Rules of Practice for Courts of Equity of the United States.

It is further certified that there was duly taken, within the time allowed by order of the court, by and before Miss Vivian Flexner, special examiner duly appointed to take testimony herein, on behalf of the complainant and the said defendant and appellant in said cause, evidence in words and figures as follows:



## TESTIMONY FOR DEFENDANT AND APPELLANT.

Whereupon T. W. Newland, called as a witness on behalf of the defendant and appellant, testified in substance as follows:

That he lived at Ten Mile, about eighteen miles southwest of Roseburg, and had lived there and in that vicinity since 1853. That he was familiar with the character of the land lying between Roseburg and the summit of the mountains, between Roseburg and Coos Bay, and particularly with the Coos Bay Wagon Road Grant lands. That in his judgment, between 1869 and 1875, the said Coos Bay Wagon Road Grant lands, being the lands title to which is involved in this suit, could not be sold in 160 acre tracts to anyone. That he never heard of anyone wanting or offering anything for it. That land in that neighborhood and of that character was not generally called for until about 1900, when the land speculators began to come in there. This demand for land was made by timber speculators and not for settlement, except in small tracts where it could be cultivated.

Touching the character of the land and its value, this witness testified as follows:

Q. I will ask you to state to the examiner what proportion of that land, in your judgment, is cultivatable land and what proportion is rocky and barren?

A. Well, take the Coos Bay road land, that is what you want to know—there is Government land

along where the road is laid—at that time it was—all that wasn't occupied then was all poor quality and wasn't, I don't think, one good acre out of a thousand would be farm land to me; it is hilly, little spots where there is a creek or two on the creek bottom that is good and then there is so much that is no good at all.

Q. I will ask you now, Mr. Newland, if in 1869 to 1875 that land that you designate so could be sold in 160 acre tracts to anybody for any purpose?

Mr. Smith: Objected to as immaterial, irrelevant and incompetent and ask that these objections apply to all questions put to this witness.

Mr. Gearin: Yes, that will apply to everything.

Q. What do you say as to that, Mr. Newland?

A. Could it be sold?

Q. Yes.

A. I do not think so, because I do not know of anybody wanting it, or offering anything for it.

Q. Was it sold or taken by anybody up until about fifteen years ago?

A. Not that I know of. The first call for land in the hills was for the timber cruisers. They located fellows on good timber and poor timber and where there was not any at all.

Q. Well, when did that influx of people begin?

A. Oh! it seems to me it is something about fifteen years ago, twelve or fifteen.

Q. The land speculators brought them in there, did they?

A. Yes; timber cruisers, fellows hunting timber.

Q. And up to that time neither the Government land, nor the Coos Bay lands was taken up at all, was it, by anyone?

A. No, there was a whole lot lying vacant. I never heard or knew of anybody to take up the rough part. There was little places of course where it was taken up for a while and they could not make a living, and they would go again.

He further said that he had always heard the company was to sell the grant lands at \$2.50 an acre, in quantities of 160 acres, and that this requirement of the grant was a matter of general conversation among the people. That if a person went along the Wagon Road and talked with the inhabitants about the matter, he would be informed that such were the requirements of the grant. He also testified that he had lived on the grant since 1875 and raised a family on his farm, which was within the grant limits.

Whereupon defendant and appellant called J. P. Stemler, who testified in substance as follows:

That he lives at Myrtle Point. That he came there first in 1884 and lived there for twenty-five years, and took up a homestead and has remained there ever since. That he is familiar with the character of the land included in the grant of the Coos Bay Wagon Road Company's grant—the lands to which title is involved in this suit. That ever since 1885 there was no demand for timber in that section of the country, or of the lands of the Coos Bay Wagon Road Company's grant. That throughout



that section of the country the timber was considered a nuisance and the settlers cut it down and burned it off to get rid of it and clear the land. That during the time he was there, from 1885, the timber land within the limits of the grant on the mountains could not be sold in 160 acre tracts to anyone at any figure.

He further said that he had heard the restrictive provisions of the grant mentioned among the people and read in the papers that the lands had to be sold at \$2.50 an acre, in tracts of 160 acres. That mountain timber land could not be sold in 160 acre or smaller tracts, but that he had never attempted to sell and such land except during the last three or four years. As to his knowledge of the character of the lands, he said that it was gained from traveling over the Wagon Road, from which but little of the land could be seen, because of the trees.

Whereupon W. Z. Cotton was called as a witness by defendant and appellant and testified in substance as follows:

That he lives at Fairview, in the neighborhood of the Coos Bay Wagon Road Land Grant lands, and has lived there since 1870. That he took up a claim there in 1882. That he was familiar with the character of the land embraced in the Coos Bay Wagon Road Land Grant as to its being bottom land, or hill and timber land. That the greater proportion would be hill land. That there would not be over 20 per cent of it bottom land. That the hills are covered with timber. That during the early days,

after he settled there in 1882, there was no demand for timber and no demand arose until about 1900. That in 1870 and for several years thereafter the timber land in the grant could not be sold in 160 acre tracts to anybody at any price. This witness further testified that he filed pre-emption claim on 120 acres in the neighborhood. That he held it for a few years and paid taxes on it; that he offered it for sale to anyone who would pay for making out the deed for the property (80 acres), and nobody would take it.

The witness further said that the settlers along the Wagon Road had discussed the terms of the grant requiring sales of the land at \$2.50 an acre, in quantities of 160 acres, and that any person could have learned of these conditions by talking with them. That he had made improvements worth about \$350 upon a small tract of the grant lands in 1906, and afterwards applied to Elijah Smith to purchase the land, but was informed that it was not on the market. In 1912, he was informed by Mr. Armstrong, Vice-President and General Manager of the defendant company, that whenever the land was placed on the market, he would be given a chance to purchase, and that he now leases the place from the defendant at \$25 a year.

Whereupon defendant and appellant called John F. Hall, a witness on its behalf, who testified in substance, as follows:

That he is County Judge of Coos County and has been County Judge for eight years. That before

that he was County Surveyor from 1882 to 1886. That he came to settle in Coos County in 1869 before the wagon road was built. That he settled on the middle fork of the Coquille, and in 1871 moved down to Coos Bay on the Isthmus Slough. That when he settled in there the only communication between Roseburg and Marshfield was by means of a pack trail over the mountains. That during the time and before the wagon road was built there was no mail communication except that the mail was carried once a week by a man on horseback. That during the years 1882 and 1886 he was Deputy Government Surveyor and surveyed on both sides of the Coos Bay Wagon Road Company's Grant, and generally throughout that country was familiar with the land and the character of it. That during the early years following his settlement in 1869 there was no demand for the timber land in the grant. That no demand arose for it until about 1885 or 1886.

I do not think that the mountain land where the heavy timber is, could have been sold in quarter section lots or smaller parcels for cash from 1870 up to '80. That between the years 1870 and 1880, he did not think the mountain land could have been sold at any price, but that after the lands had been transferred to the Southern Oregon Improvement Company, there were a number of people who wanted to purchase and were willing to pay \$2.50 an acre, but were unable to secure the land.

Whereupon defendant and appellant called the



witness, L. D. Smith, who testified in substance as follows:

That he lives on Coos River in Coos County and has lived there since 1865, and was there when the Coos Bay Wagon Road Company's wagon road was built. That prior to the building of that road the only communication between Marshfield and Roseburg was by a row boat or canoe from Marshfield to the head of South Coos River and by pack trail from there over the mountains to Roseburg. That there was no road over the mountains until the wagon road was built. That during the years from 1865 to the present he had been over a great portion of the country embraced within the limits of the grant and the adjoining country and was familiar with the character of the country and its soil, etc., and as to its being hilly or covered with timber, or otherwise. That there was bottom land on the grant and hilly, rocky and timber land. That the proportion of bottom land was very small. Witness could not even make a guess of the percentage of it. That the land along the creek bottoms was very good land and the balance, lying on the hills was timber land and some of it barren and rocky. That up to 1875 the land on the hills could not have been sold to anyone for any sum. That no one attempted to buy any of it or to take it up and it was not considered worth anything. That as to the timber, the principal desire of settlers was to burn it up and get rid of it, prior to 1883, there being no demand for it, but after that, a lively demand was developed. That he had been



over a portion of the lands embraced within the limits of the grant, but had never made an examination for the purpose of classifying it.

Whereupon defendant and appellant called D. J. Thrift, who testified that he was County Assessor of Coos County and had been such for the last twelve years and has lived in Coos County for twenty-four years. That up to the year 1900 there was no demand for timber on the lands in the vicinity of Coos Bay Wagon Road Grant, or the lands embraced in the grant. That the first timber buyers came into the country about 1900. That up to that time there was no demand for the timber at all, except a small demand by local buyers and the lands up to that time had no marketable value. That in his judgment there would be possibly 3,000 acres of bottom land in the grant. The balance of the land might be designated timber land, part of it barren. About one-half a township would be barren and rocky. The balance of the grant outside of the bottom land and the barren, rocky worthless land, he designated as lands covered with timber and chiefly valued for timber. That the timber land prior to the advent of timber buyers about the year 1900 "was absolutely worthless, almost," and was assessed as low as 10 cents an acre. But that 90 per cent of the grant lands could be rendered tillable by clearing. Referring to Defendant's Exhibit 177, showing a classification of the lands into tillable and non-tillable, for the purpose of taxation, he said that the classification was not correct, that some of the lands

classified as "non-tillable" are "tillable," also that the State Tax Board considers the assessed valuation of lands in Coos County, as 69 per cent of the actual value.

Whereupon defendant and appellant called J. D. Benham, who testified in substance as follows:

That he lives at Fairview, in Coos County, and has lived there since 1875. That he has been over the lands of the Coos Bay Wagon Road Grant a great many times and is familiar with the nature of the country and the character of the land embraced in the grant. That the great body of the grant is timber land and only a small proportion bottom land. That from 1870 up to 1880 there was no demand for timber land in that county. The timber land could not, in that county within the limits of the grant and adjoining lands, be sold to anybody for cash at any figure. That he did not know of anyone buying any, or attempting to buy any. That some of the timber land is barren and rocky, without even timber on it. That of late years there has grown up a demand for the timber and all the adjoining land, being timber land, has been taken for the timber.

That the requirements of the grant to the effect that the lands must be sold at \$2.50 an acre in quantities of 160 acres, had been a matter of conversation among the people along the road for many years and that anybody talking with them could have ascertained this. That he has never been engaged in selling timber, his occupation being that of a farmer.

That he knew of several parties who wanted to buy grant lands, only one of whom succeeded in doing so. Why the others did not, he did not know.

Whereupon defendant and appellant called L. A. Lawhorn, who testified in substance as follows:

That he lives near McKinley in Coos County, and has lived there since 1871. That he is familiar with the lands embraced in the Coos Bay Wagon Road Land Grant, title to which is involved in this litigation. That a part of the lands are bottom land—part what he designates as bench lands—and part is mountainous and hilly lands. That in his judgment about one-fourth of the land would be bottom lands. This part of the land in the neighborhood of the grant was taken up in the early days. That up to the year 1880 no lands were taken up except in the bottoms and the hilly land was not taken up at all. That the hilly land within the grant is generally heavily timbered and some of it rocky and precipitous. That during the year 1871 up to 1878 there was no market for timber in that county and no demand for it. That he (the witness) marketed the first timber, and that was about 1882. That up to the year 1880 the timber land on the hills within the limits of the Wagon Road Grant could not be sold to anybody in 160 acre tracts for any sum. That he never heard of anybody wanting to buy it until after 1880, when the timber companies began buying. What he designates as the timber excitement began about 1901, when there arose a great demand for timber and all the adjoining lands, which were



valued for timber, were taken up. That when he came to Oregon in 1870, he heard that the grants had been made for the purpose of aiding in the construction of a wagon road from Roseburg to Coos Bay, and that according to the terms of the grant, the land was to be sold at a price not to exceed \$2.50 an acre, and in quantities not exceeding 160 acres. That between 1871 and 1880 he knew of no lands being taken up on the hills, except in connection with bottom lands. That he estimated that one-fourth of the grant within the place limits was bottom land and that in addition to the hill and bottom land, there is bench land, which is good for grazing, but not for staple crops, and that a very small portion of the hill land would be tillable if clear.

Whereupon defendant and appellant called H. W. Halverstott, who testified in substance as follows:

That he lives at Fairview, in Coos County, and has lived there since 1873. That he is familiar with the character of the lands embraced within the limits of the Coos Bay Wagon Road Land Grant—the lands title to which is involved in this suit—that he has been over them frequently. That he has a general knowledge of the nature of the land as to its being hill land or bottom land. That a very small portion of the land embraced in the grant is bottom land. Outside of this bottom land and the small proportion that might be termed bench land, the balance of the grant is covered with timber. That there was no demand for this timber land



from 1873 up to 1880 and afterwards. That the witness never knew of anyone taking up any of these timber lands adjoining the Coos Bay Wagon Road Grant and remaining on them. That he did know of a few who took homesteads on the adjoining hill lands, but abandoned them. That they stayed just long enough to prove up on their entries. That from 1873 to 1880 the timber land on the hills, within the limits of this grant, could not have been sold in 160-acre tracts to anyone. That the witness was familiar with the value of timber and timber land in that county and that during these years the timber had no value. That settlers were glad to get rid of it in any shape. That they would have given the timber away if anyone would take it. He further testified that the restricted provisions of the grant were generally understood and talked about amongst the people along the line of the road, and that if anyone endeavored to discover the status of the land, they would have learned of those provisions, if they got amongst the people. That he purchased a quarter section of the grant land at \$2 an acre in 1873. That between that year and 1880 there was no demand for timber. That he knew of no sale of mountain timber lands in tracts of 160 acres between those years, and that he had raised a family of six children on the quarter section which he had purchased. His knowledge of the land, he said, was gained from travel over the Wagon Road; that in many places he could see

only a few rods, and that he had been over very little of the land itself.

Whereupon defendant and appellant called witness George Norris, who testified in substance as follows:

That he lives at Fairview, in Coos County, and has lived there since 1868 and is familiar with the character of the land embraced in the Coos Bay Wagon Road Land Grant. That he was there before the wagon road was built. That the only means of communication up to that time between Roseburg and Coos Bay was by means of a pack trail, called the "Brewster Trail," over the mountain. Witness says he has a very good knowledge of the entire country, having been over it a great deal hunting and tramping around through the mountains. A portion of it is bottom land and a portion timber land. That about 75 per cent of the grant is hill and timber land. That from the time the witness went in there to live up to 1880 there was no demand for the timber land by anybody, and the timber portion of the grant could not be sold to anyone in 160-acre tracts for any sum.

Q. What portion would you say is bottom land, Mr. Norris?

A. Well, that would be a very hard question for me to answer and get anywhere correct on short notice.

The witness further testified to the effect that the requirements that the lands must be sold in quantities of not to exceed 160 acres at \$2.50 an

acre to one person was a matter of general talk amongst the people, and that anybody talking with the people along the Wagon Road would have learned of those conditions. That he was of the opinion that timber lands on the hills could not be sold in 160-acre tracts between 1868 and 1880. That he had heard of persons trying to buy some of the grant lands which they had settled upon along the river creeks and bottoms, but they were unable to do so. He had nothing to do with the sale of the lands and knew nothing about the applications that might have been made for them to the owner. A great deal of the land adjacent to the bottom land, he said, could be used for grazing, if cleared, and that the bottom land is very desirable.

Whereupon defendant and appellant called the witness Albert E. Bettis, who testified in substance as follows:

That he lives in Coos County in the vicinity of the Coos Bay Wagon Road and has lived there since 1874. That he is familiar with the character of the land embraced within the limits of the Coos Bay Wagon Road Grant. That a portion of the grant is bottom land and a portion timber land on the mountains. That there is a portion of it lying next to the bottom land and at the foot of the hills that might be designated as bench land. The greater portion of the grant is hill and timber land. That for several years after 1874 there was no demand in that county for the timber land at all. Witness never knew of anyone settling upon

the hill lands. That there is a portion of the grant upon the hills that is barren, rocky and worthless. That there was no demand for timber land in that country for many years after the grant to the Coos Bay Wagon Road Company. That the demand for timber began about twenty years ago—in the neighborhood of 1895. That previous to that time no one could sell a timber claim of 160 acres in that country for cash at any figure. That the timber lands in the Coos Bay Wagon Road Grant could not have been sold during those years for \$2.50 an acre, or any sum.

Q. Did you know of anybody settling those hilly lands?

A. I did not.

Q. Now I will ask you to state, Mr. Bettis, if, in your judgment, in 1874, when you held in there, the land on the hills could be sold in 160-acre tracts, or smaller tracts to anybody for cash?

A. Well, at that time, you know, I was quite small, but, of course, I know the circumstances from that time up, and there was no hilly land sold for a great many years afterwards. Of course, the Coos Bay Wagon Road took the lands off the market shortly after this, in 1874.

Mr. Bettis further testified that there was no demand for hill timber lands in the Fairview District between 1874 and 1880, and that he did not think the timber land in the grants could be sold in tracts of 160 acres or less for money during that period, but he never had anything to do with sell-



ing land for the Wagon Road Company and knew nothing about applications to purchase the land except within the last few years. Shortly after 1874 the Coos Bay Wagon Road Company took the lands off the market. That it sold none of the lands to anybody after withdrawal, and that the policy of the other owners of the land, with respect to their sale, was the same as that of the Wagon Road Company. Also that since the withdrawal of the lands no sales had been made, except a few tracts, by any of the owners of the land. That he had never examined any of the lands for the purpose of determining their character, and that the refusal of the Coos Bay Wagon Road Company to sell the lands prevented settlement in the neighborhood in which he resided.

Whereupon the defendant and appellant called the witness, William Bettis, who testified in substance as follows:

That he lives at McKinley, in the Fairview District, in Coos County, Oregon, in the neighborhood of the Coos Bay Wagon Road Land Grant, and has lived there since 1874. That he is familiar with the character of the lands embraced in the Coos Bay Wagon Road Land Grant and has been over them at different times. That a portion of the grant is bottom land and a portion timber land and a small proportion of it is bottom land. That from 1874 up to 1880 there was no demand for timber land in that country. That during those years the timber land within the grant could not be sold

in 160-acre tracts, or smaller tracts, to anyone. Witness did not know of anyone buying timber land in those years within the grant, or within the neighborhood. The demand for timber began twelve or fifteen years ago and before that time there was no demand.

Whereupon the defendant and appellant called witness J. C. Haynes, who testified in substance as follows:

That he lives at Myrtle Point, in Coos County. That he first came into Coos County in 1859 and lived on Coos Bay from 1859 to 1896. That he went to Myrtle Point in 1896. That from 1862 to 1886 he was a lumberman, and after that went into the dairy business. That he was in this country before the Coos Bay Wagon Road was built, and before the building of that road the only way of reaching Roseburg from Coos Bay was to go to the head of Coos River by boat and take a trail along the divide that entered Umpqua Valley and over the mountains. That there was another way out by trail to Gardner up the Umpqua River. That during the time the witness was engaged in the lumber business he was principally occupied with logging within one-half mile of tidewater. That there was no logging beyond one-half mile of tide-water, and that that was the limit within which the logging business could be carried on. That witness is familiar with the limits of the Coos Bay Wagon Road Land Grant and the character of the land embraced within the grant. That from 1870 and 1871

for at least ten years thereafter there was no demand for timber within the limits of that grant. That during those years there was no timber land taken up on the mountains adjoining the grant. That during those years the timber land within the grant and the land adjoining the grant could not be sold in 160-acre tracts, or smaller tracts, to anyone for cash.

Q. Was there any of that timber land on the mountains taken up by anybody?

A. Not to my knowledge.

Q. I see you bought 16 acres of land from them (the Wagon Road Company), in what year, Mr. Haynes?

A. I think it was 1872.

Q. In 1873—it was March 9, 1873?

A. Yes. \* \* \*

Q. Between that time and the present time, do you know of the Coos Bay Wagon Road Company attempting to sell any lands?

A. No; they absolutely refused.

Q. They have refused right along to sell any, is that true?

A. Yes, sir.

He also testified that since 1869 the people were familiar with the terms of the grant requiring the sale of the lands at a price not to exceed \$2.50 an acre, and in quantities not greater than 160 acres to one person, and that these provisions were frequently discussed among the people along the line of the road. That for ten years after the construc-

tion of the road there was no demand for mountain timber lands, and that in his opinion such tracts could not have been sold in tracts of 160 acres or less for cash. That he purchased 160 acres in 1873 for \$1.25 an acre, which he has resided upon and cultivated ever since. That soon after he acquired this land the Coos Bay Wagon Road Company took the lands out of the market and that ever since that time, both it and its successors have absolutely refused to sell any of the land.

Whereupon the defendant and appellant called the witness L. E. Rose, who testified in substance as follows:

That he lives at Myrtle Point, in Coos County, and has lived there for twenty-five years. That before that time he lived on the east fork of the Coquille River, having settled there in 1877. That he is familiar with the boundaries of the Coos Bay Wagon Road Land Grant and with the nature and character of the land embraced within the limits of that grant. That a portion of the grant is bottom land and a portion hill timber land. That the bottom land constituted only a very small portion of the grant, the balance of the grant being hills; some of it being precipitous, rocky and broken. That in 1877 and during the years prior thereto and for several years thereafter there was no demand in Coos County for the timber on the lands in the grant, or the adjoining lands. That the timber had no value except for fire wood, and those who owned the land were anxious to get rid



of the timber on it. There was no market for it, and it could not be sold. That during those years the timber land embraced within the grant could not be sold to anyone in one-fourth section lots, or smaller lots, for cash or anything, or at any price.

Q. You never attempted to buy any land from the Coos Bay Wagon Road Company?

A. No, I never did.

He further testified that he was acquainted with the conditions of the restrictive provisions of the grant, and that anybody who went amongst the people along the road could have learned of them. That in 1877 the timber land embraced in the grant could not be sold to anybody in quarter sections. That there was considerable feeling against the Wagon Road Company for not selling the land.

Q. Mr. Rose, when did this cussing of the Coos Bay Wagon Road Company begin?

A. Oh, good Lord, I couldn't tell you that; the memory of man runneth not to the contrary, I remember that.

Settlers had built little homes upon some of the lands, where they made a living.

Whereupon defendant and appellant called the witness J. J. Klinkenbeard, who testified in substance as follows:

That he lives in Coos County, near the mouth of Daniels Creek, and has lived there since January, 1880. Previous to that time he lived in Roseburg. That he is familiar with the boundaries of

the Coos Bay Wagon Road Land Grant and the nature and character of the land embraced within the grant. That some of it is bottom land and some of it hilly, timbered land. That the bottom land comprises only a small portion of the grant—not more than 10 per cent. That the balance of the land is hilly, timbered land; some of it rocky, precipitous and barren. That the witness never heard of anyone buying timber land on the hills in the neighborhood of this grant during the years he lived there up to 1880, and is of the opinion that there was no market for it during those years.

Q. Did you go to the Southern Oregon Company and ask to purchase the land?

A. I went to their office. Mr. George Loggie was general manager of the company at that time, and he proposed to sell me, but he wouldn't sell me forty acres. He wanted to sell me a larger tract, more than I wanted to buy. \* \* \*

Q. But because he wanted to sell 220 and you wanted only 40, the bargain wasn't made?

A. The bargain wasn't made.

He further testified that it was generally understood amongst the people along the road that the Wagon Road Company was obliged to sell the lands at a price not to exceed \$2.50 an acre, and that anybody who went among the people would have learned this fact. That prior to 1875 the Coos Bay Company sold some of the lands, but in that year took them off the market and refused to sell any more, and that neither the Oregon Southern Im-

provement Company nor the Southern Oregon Company offered any of the lands for sale. He had heard men say they wanted to buy grant lands, but were unable to do so, and it was generally understood that the lands were not in the market. He never heard of any demand for hill timber land in 160-acre tracts during 1875 or 1880.

Whereupon defendant and appellant called the witness S. A. Gurnery, who testified in substance as follows:

That he lives at Reston, eighteen miles from Roseburg, along the line of the Coos Bay Wagon Road, and has lived there fifty-two years. That he is familiar with the limits of the Coos Bay Wagon Road Land Grant and the nature and character of the land embraced in the grant. That not exceeding one-tenth of the land would be denominated bottom land, which could be cultivated. This would be in the valleys and along the creeks. The balance was timber land, and in the early days had no value. No settlements were made on the timber land adjoining the grant up to fifteen years ago. About fifteen years ago timber cruisers began bringing speculators into the country and they took up all the timber land, or practically all of it. The Government lands lying adjacent to the Coos Bay Wagon Road Grant lands were not taken up and lay idle until the timber excitement of about fifteen years ago.

From 1869 to 1875 and 1876, I do not think that any of that land that I have just designated

the rocky and hilly land could be sold to anybody in 160-acre tracts at any price.

The witness further testified that between 1869 and 1876 he did not think any of the rocky hill land could be sold to anybody in tracts of 160 acres for any price, except a small piece of adjoining land owned by individuals. That he was a farmer and had resided within the limits of the grant since 1853. His knowledge of the grant lands was limited to that part lying between Roseburg and the top of the Coast range.

Whereupon defendant and appellant called the witness W. J. Coates, who testified in substance as follows:

That he lives at Ten Mile, within the limits of the Coos Bay Wagon Road Grant. His father and mother moved to Ten Mile in 1853 and took up a donation claim there. The witness is living on a claim which had been taken up as a donation claim by his uncle. Witness knows the limits of the Coos Bay Wagon Road Land Grant and is familiar with the nature and character of the land embraced within the limits of that grant. He was there when the road was built and witnessed its construction. There is very little cultivable land within the limits of the grant, including grazing land and cultivable land together, perhaps one-tenth of the grant would cover both descriptions. The other nine-tenths witness describes as timber, brush and rock, and is not suitable for settlement of any kind. From the year 1869 and for ten years thereafter the por-



tion of land described by witness as timber land could not have been sold in 160-acre tracts to anyone for any price. The Government land lying adjacent to the land grants remained unsold. The first dealing in these lands began about fifteen years ago when Eastern people began taking up the timber. Prior to the grant in 1869, the lands in the valleys—in Looking Glass Valley, Flourney Valley and Ten Mile Valley—were largely taken up by donation claimants. The lands in these valleys that could be taken at all were all practically taken up as donation claims. When the timber excitement began, those who had taken up the land as timber land did not settle on it. They just built a small log house and went away, getting it from the Government at \$400 a quarter section. From the year 1869 down to ten years afterwards, in my judgment, that portion of the lands which I designate as unsuitable for settlement could not be sold to anybody in 160-acre tracts at any price at all. My testimony covers the land lying on each side of the road about fourteen miles from Reston to Brewster Valley.

But he had nothing to do with the sale of the Wagon Road lands and did not know what applications to purchase them had been made to the company.

Whereupon the defendant and appellant called the witness A. E. Bushnell, who testified in substance as follows:

That he lives at Reston and has lived there for

thirteen or fourteen years. Before that he lived at Ten Mile, since 1859. He was born there in 1859, his father and mother having gone into that country in 1853. They took up a donation claim there in 1853. Witness is familiar with the boundaries of the Coos Bay Wagon Road Land Grant and the nature and character of the lands embraced within the grant. Within the boundaries of the grant the average would be probably one acre of cultivable land to the section. The rest would be just rough, hilly land, not useful for any purpose. From 1869 to 1880, at least, the timber land within the limits of the grant of the Coos Bay Wagon Grant could not be sold in 160-acre tracts to anybody for any price. In the neighborhood in which witness lived, the Government sections lying adjacent to the land grant lands were not taken up. There was no movement to take up Government land, or to buy any timber land in that country up to about twelve or fifteen years ago. At that time timber cruisers began bringing speculators into the country and locating them upon these timber lands. None of those came in there to settle, and there are none of them in there now. They took up the land—bought it from the Government—and went away. The land in Flournoy Valley and Looking Glass Valley was all practically taken up before the grant to the Coos Bay Wagon Road Company in 1869. He further testified that he knew very little about the timber business, or whether the Southern Oregon Company had attempted to sell or anybody at-

tempted to purchase the timber lands. That the worthless lands of the grant extended from Reston to Brewster Valley, a distance of fourteen miles. The length of the grant is sixty-five miles.

It is further certified that E. P. Mast, a witness called on behalf of the complainant, testified that he went into the Coos Bay Company in 1872; bought his place from the company and had no trouble about it. As to the character of the land, he testifies:

Q. Outside of the land in that valley (Brewster Valley), and outside of the lands situated upon the creek bottoms, what was the rest of the land of that grant worth, in 1872?

Mr. Smith: Objected to as not proper cross-examination and I asked that this objection be treated as made to all questions put to this witness on cross-examination, touching the same subject.

Mr. Gearin: For the purpose of this question, I will make Mr. Mast my own witness.

Q. What was it worth in 1872?

A. Well, of course it is mountainous and rocks and timber and everything else. Of course, only along the creeks and river bottoms it is all mountains, rocks and hills.

Q. I will ask you to state, Mr. Mast, if, in your judgment, in 1872 or up to 1875, that lands on the mountains could be sold for real money to anybody?

A. It could not have been sold to me those days

for anything. I would not have taken it as a gift.

Q. Could it be sold in 160-acre tracts, or smaller tracts, to anybody for cash?

A. Well, as far as I know, they could not, because there was no demand for timber and the hills would not have been worth anything at all to any man living on them. There was nothing only them mountains and rocks. They could not make anything out of it.

The witness further testified that the people along the Wagon Road discussed the Government requirement that the lands be sold at a price not to exceed \$2.50 an acre and in quantities not exceeding 160 acres to one person, and that this was understood by everyone from 1872 down. That he settled on some of the grant land in 1873, and in 1875 applied to Dr. Hamilton, who represented the Coos Bay Wagon Company, to purchase it, but was informed that none of the land was for sale at that time. Later, Metcalfe, of the Southern Oregon Company, proposed to sell to the settlers the land upon which they had made improvements, at an appraised value, but most of the people were afraid of the title, so few of them purchased. The witness paid \$3 an acre for his land. The mountain and hill land, so far as the witness knew, could not be sold in 1872 in tracts of 160 acres, but he was not aware of any efforts made by the Coos Bay Wagon Road Company to sell it, or any part of the grant lands.



Whereupon the defendant and appellant called W. W. Crapo, who testified in substance as follows:

That he is eighty-one years old, lives in New Bedford, Mass., is by profession a lawyer; has served in Congress, been president of banking institutions, state and national, has administered trustee estates and has been active in business affairs during his whole life. He first became interested in Southern Oregon Company lands in 1883; that Wm. H. Besse induced him to invest some money in the purchase of bonds of the Southern Oregon Improvement Company, which covered the properties in dispute in this suit. That about March, 1883, Wm. H. Besse was the owner of a number of ships and had been out on the Oregon coast investigating the land in the neighborhood of Empire City and Coos Bay and was very much interested in it and very enthusiastic about it. In about June or July of that year he urged him (Crapo) to join him in investments at that point, and Besse stated that in his judgment Empire City was the only port that was available for commercial purposes between San Francisco and Portland; that the bay was a fine body of water; the entries to the bay easy; it had a custom house and was the county seat of Coos County, and it offered to his mind great prospects of being a very important point on the Pacific Coast. He had become acquainted with a man named Luce, who was the principal owner of Empire City, owning a mill there, timber land, hotel and stores. Besse bought

this property, but whether he had already bought it or bought it subsequent to that time, the witness does not remember. It became, however, a part of the investment in the Coos Bay Company. There was about 6,000 acres of it—a small mill and extensive dock and wharf property, where vessels stopped, etc. Another thing which attracted Captain Besse's mind and which he communicated to Mr. Crapo was that there were coal mines in operation in the vicinity, and he had an idea of transportation of coal and lumber to San Francisco. Besse gave Crapo the names of persons who had already subscribed to the Empire, and they were men of large means in New Bedford. The proposition made by Besse was for the purchase of bonds of the property acquired, or to be acquired, of the Oregon Southern Improvement Company. The witness purchased the bonds; at first purchasing \$10,000 worth; afterwards he made other purchases. The bonds were sold for actual cash at the price of 80 cents on the dollar, although some sold as low as 50 cents on the dollar. In the inception of the enterprise there was no talk then about the Coos Bay Wagon Road Company. That came in later on in the negotiations. Touching this matter, witness testifies that Besse told him he had the opportunity to purchase about 100,000 acres of land, which had been acquired by the company, or by some parties, and which grew out of a land grant given by Congress to the State of Oregon, for the building of a military wagon road from Roseburg to Coos Bay.

Witness says that he was over the road twice, some years afterwards. Besse thought this land would be a very valuable addition to the property already acquired and talked about buying coal mines in anticipation of the great development of Empire City and the timber resources and productions which would come down to Coos Bay. His attention had been called to the Coos Bay Wagon Road lands, that they could be purchased, and he asked the witness's judgment about it. The witness told Besse that two things were essential before he closed any negotiations: One was the matter of title, the other was the value of the property. Witness told Besse that the title should be carefully examined so as to know what the condition of it was. Besse afterwards reported to witness that the title had been examined by a lawyer in Portland, who had declared it perfect. Witness says that at the time he had in his employ a man familiar with timber and the method of cruising, who was a logger, woodsman and timber cruiser, and Besse wanted witness to send Foster to Oregon to cruise the timber, and witness did so. Foster did cruise the timber and reported on it. Witness says he never had any communication with or relations with the Coos Bay Wagon Road Company, or with John Miller, or Collis P. Huntington, or Charles Crocker, the parties mentioned in the complaint in this suit. Witness knew Russel Gray as a lawyer in Boston, but had no acquaintance or relations with him as to the matters involved in



this suit. Witness testified that he had nothing further to do with the transfer of title in 1883 or 1884, or the execution of the mortgage, or the acquisition of these properties, except as herein outlined. Witness remembers that the Oregon Southern Improvement Company in 1884 executed to the Boston Safe Deposit & Trust Company a mortgage on the properties, and it was the bonds under that mortgage which witness bought. The Oregon Southern Improvement Company was not successful. It spent a large amount of money in building a new mill and building a steamer, which proved unsuitable, and there were heavy losses on the mill and steamer. Due to this and large expense for building a logging railroad, which proved unprofitable, and the market for lumber having fell away, the company was unable to pay the interest on its bonds. Witness says that about \$800,000 was actually spent in money for these different properties, including the Coos Bay Wagon Road Company's lands. The company paid \$100,000 for the "Coos Bay Wagon Road lands," being the lands title to which is involved in this suit. On the 9th of December, 1886, the Boston Safe Deposit & Trust Company, which was the trustee under the bond mortgage, was succeeded by Wm. J. Rotch and Edw. D. Mandell, as trustees. The reason for that was that the Oregon Southern Improvement Company was in considerable financial distress and it became to the interest of the bondholders to have a foreclosure of the mortgage that the property might



be placed in condition for operation, etc. The change was a matter merely of convenience and because the Boston Safe Deposit & Trust Company did not wish to begin the foreclosure proceedings.

The witness further testified as follows:

Q. Mr. Crapo, at that time did you know of a limitation in the original Act of Congress?

A. I did not.

Q. Did the retirement of the Boston Safe Deposit Company as trustee and the substitution of Mr. Rotch and Mr. Mandell have anything to do with the limitation?

A. Nothing whatever; no suggestion at that time had ever been made to my knowledge, that there was any defect in the title of the Coos Bay land.

Q. Well, they proceeded to foreclose?

A. Yes.

Q. And then you and Mr. Rotch purchased the property?

A. Yes.

Q. At the foreclosure sale, for the benefit of the bondholders?

A. Yes.

Q. How did it happen you and Mr. Rotch purchased at the sale instead of you and Mr. Mandell? Had Mandell died?

A. No.

Q. When did he die?

A. He died subsequently to that; I think Mr. Rotch died before Mr. Mandell died. They were the

trustees and naturally the committee of bondholders for the purchase would be different parties.

Q. So it was specially by arrangement among the bondholders that you and Mr. Rotch were appointed?

A. Yes.

Q. And you received the conveyance?

A. From the court.

Q. At that time, Mr. Crapo, had you any knowledge whatever of the limitation in the original Act of Congress?

A. None whatever.

Q. Did Mr. Rotch?

A. I am sure he did not.

Q. You were constantly with him?

A. Oh, yes.

Q. What were your relations with Mr. Rotch?

A. In business and socially, very intimate.

Q. You knew of these matters?

A. Yes.

Q. And Mr. Rotch is dead?

A. Yes.

Q. When did he die?

A. In 1893.

Q. Then the Southern Oregon Company was organized out of the bondholders?

A. The Southern Oregon Company was organized to take this property.

Q. And you made conveyance?

A. Yes; made conveyance to the Southern Oregon Company.

Q. And at the time you made that conveyance, which was on the 14th day of December, 1887, had you any knowledge up to that time of this limitation?

A. None whatever.

Q. Or any defect in the title?

A. No.

Q. Had Mr. Rotch, as far as you know?

A. No.

Q. Did the persons who composed the bondholders of the Southern Oregon Company have any?

A. No, I think not; I don't think it is possible that they could have known.

Q. Do you remember what the arrangement was in the organization of the Southern Oregon Company as to what the bondholders were to receive in the stock of the Southern Oregon Company?

A. Well, the Southern Oregon Company was organized with its capital stock fixed at \$1,500,000; the bondholders received ten shares of stock for each \$1,000 bond in the Southern Oregon Company upon the payment of an assessment of \$50 or \$100, I don't recall which, but there was an assessment made which furnished some ready cash.

Q. To pay the expenses of foreclosure, I suppose. Anything else?

A. Yes; the money passed through the hands, and all the accounting, etc., of Prosper W. Smith, who was the treasurer; but that was the fact. When that distribution was made there was left in his hands—it didn't take the whole million and

a half; it took about one million two hundred and odd thousands, so there was some—

Q. \$250,000?

A. \$260,000 or \$270,000 that was left, what we called treasury stock; the whole million and a half was not issued; the only issue was enough to satisfy the bondholders and the balance was not issued except it was issued at the time in the name of William J. Rotch and William W. Crapo, trustees.

Q. What did you do with it?

A. Afterwards we transferred that to the Southern Oregon Company.

Q. You gave the treasury stock?

A. We gave the treasury stock.

Q. Now when was the first time that you ever heard of the limitation in the original Act of Congress which was not incorporated in the patents?

A. It was about the time of the Nichols suit.

Q. What was that suit?

A. A man named Nichols had tendered to the Southern Oregon Company \$400 and demanded a deed of a certain specified 160 acres of land.

Q. Can you tell about what time that was?

A. I should say it was seven or eight years ago.

Q. 1903 or 1904?

A. Yes.

Q. Up to that time you had never heard of this limitation?

A. That was the first intimation I had of it when that suit was brought.

Q. When was that suit?



A. The record will give that, to the best of my impression.

Q. That suit you say this Nichols brought—

A. Nichols was the plaintiff.

Q. He had made a tender?

A. He had tendered \$400, which was \$2.50 an acre, for 160 acres of land specified, and the land he wanted was, of course, a choice section, and there was a multitude of other people who also made their tenders.

Q. What became of them?

A. One was Senator Tillman, of South Carolina, by the way, but the only suit brought was by this man Nichols.

Q. What became of it?

A. It was tried and it was the decision of the judge—Bellinger, I believe—a circuit judge; he dismissed the petition; it was in favor of the defendant, the Southern Oregon corporation.

Q. It was through that this first came to your observation, through that agitation?

A. Yes.

Q. Mr. Rotch died when?

A. In 1893.

Q. So he could not have heard anything of it?

A. No.

Q. At the time of his death?

A. No.

Q. Now, Mr. Crapo, I want to put one or two direct questions on account of the allegations of that bill brought by the Government of the United

States. Was the alleged indebtedness which was the basis of the mortgage fictitious, feigned and untrue?

A. That is not true; it was not fictitious.

Q. "Feigned and untrue," the United States alleges that. What do you say to that?

A. I say it is not correct.

Q. What was it?

A. It was the expenditure of a large amount of money.

Q. Actual value?

A. Actual value; I know my investment of money was actual.

Q. Was it made for the purpose, made and foreclosed with the intent and hope that thereby the limitation of the Act of Congress might be avoided and defeated?

A. It is not so.

Q. Did it have anything to do with it whatever?

A. None; the purpose was to save to the bondholders all we could get from the property.

Q. Was there any justification, so far as you know, for any such allegation in the Bill brought by the United States of America?

A. None whatever.

Q. These bonds were held now generally; that is, what citizens of what states owned them?

A. Why, the largest holdings were here, I suppose, in New Bedford; there were some in Wareham and on the Cape, some in Boston, quite a number in Maine, some in New York. I speak of that,

knowing that the bonds came through my channel in distributing the stock.

Q. The stock that was distributed for the bonds you had to sign the certificates?

A. Yes, or under my direction.

Q. So far as you know, they were substantial?

A. All bona fide.

Q. And you have stated all the knowledge or participation which you had in the original purchase by Captain Besse from the Crocker-Huntington syndicate?

A. I have.

Q. Have you at any time done any act or made any admission that this title was subject to the limitation of the Act of Congress?

A. No, I have not.

Q. Or have you ever done any act or made any attempt to conceal from the United States the alleged violation of the limitation?

A. None whatever.

Q. Was any act that you have ever done in connection with this company, the Southern Oregon Improvement Company, ever done with the purpose of concealing any such limitation from the United States?

A. Never; no, none whatever.

Q. Are you now interested in the Southern Oregon Company?

A. I have no financial interest in the company, either as stockholder or as creditor, absolutely no

pecuniary interest in the Southern Oregon Company or in this company.

Q. I ask you now whether you had any interest whatever in the stock of the Oregon Southern Company, or ever had any interest in the stock of the Oregon Southern Improvement Company?

A. No.

Q. None whatever?

A. None.

The witness further testified that before the Southern Oregon Improvement Company invested in the lands he caused an experienced timber cruiser, by the name of Foster, to visit the lands, examine them and make a report to him and his associates. He further said that only a sufficient amount of stock was issued by the Southern Oregon Company to satisfy the bondholders of the Oregon Southern Improvement Company.

Whereupon the defendant called as witness Mr. Rotch, who testified in substance as follows:

That he is by profession a civil engineer, having obtained his degree in Paris in 1869; that from that time up to about ten years ago he was actively engaged as an engineer in railroad construction and other engineering work; that he still acts as consulting engineer, but is not in the active practice. That he was first connected with the Oregon Southern Improvement Company in 1883. That the Oregon Southern Improvement Company was organized at first by Captain Wm. H. Besse, who was a retired ship master in New Bedford, and



who had commanded a number of ships, and the father of witness—Wm. J. Rotch—was interested. Witness's father, Wm. J. Rotch, was one of the largest subscribers to the securities of the Oregon Southern Improvement Company, and his partner, L. A. Plummer, subscribed an equal amount. Witness testified that he became an officer in the Oregon Southern Improvement Company, to-wit, treasurer and assistant secretary, from April, 1883, to August, 1884. The office of the company was in the witness's office in Boston. Witness kept the books, or accounts, of the company as treasurer. The last time he saw them was in 1884, when he turned them over to his successor, Prosper W. Smith, and he has not seen them since that. During the year 1883 the witness received subscriptions from various people who were to take bonds of the Oregon Southern Improvement Company. Witness received during 1883 cash subscriptions to the amount of \$177,000. The mortgage was executed by the Oregon Southern Improvement Company to the Boston Safe Deposit & Trust Company—two mortgages—to secure the bonds of the company. The mortgage was dated January 1, 1884, and was executed about April, 1884. There was a delay from the time of the execution of the bonds up to the time of their delivery, on account of having a supplemental mortgage issued, because the land lay in two counties. Witness was treasurer when the bonds were ready for distribution. The bonds were delivered to the persons who paid in the money

on the subscriptions. The bonds were issued at 80 and carried an amount of stock in the company equal to the amount of the bonds. The company spent \$100,000 for a steamer called the "Alki." The company purchased lands of the Coos Bay Wagon Road Company while the witness was treasurer. The money did not pass directly through the witness's hands. The original subscriptions were not sufficient to pay all the expenses of the company and to purchase this additional amount of land, and after preceding purchases of land had been paid for. A syndicate of six persons, who were all original subscribers, arranged to furnish the money for the purchase of the Coos Bay Wagon Road land and to receive bonds and stock on the same basis of the original subscription. Witness delivered the bonds and stock of the company to the syndicate in return for the land. This includes all of the land except the 30,000 acres sold to Miller and afterward to Huntington, Hopkins and Crocker. That was paid in cash, and amounted to \$30,000. This left the land known as the Coos Bay Company's land 60,000 acres, which was paid for at \$1.50 an acre, making \$90,000—in all for the Coos Bay Company's land \$120,000. No bonds were ever issued except to subscribers and on the basis of 80 per cent of the par value.

Concerning the business of the Oregon Southern Improvement Company and its failure, this witness says:

Q. 70. Will you tell us a little, Mr. Rotch, about

the business of the company while you were treasurer—what business it was engaged in?

A. Captain Besse, in his command of ships from New Bedford, had occasion to visit the Pacific Coast on many occasions, and he noticed that the harbor at Coos Bay, in the southern part of Oregon, appeared to be a very attractive harbor, and he had discovered that the timber on the land in that vicinity, in the vicinity of Empire City, which is located on Coos Bay, and farther to the north, was very well wooded, and that the timber was apparently very valuable. He organized this company with the special purpose of buying that land, or some of it, building a mill, a large sawmill, constructing a railroad and operating it, taking the timber in a steamer and also in schooners to be chartered, to San Francisco and other points for sale. There was also coal on some of the Luce land—we called it the Luce land—bought from a man named Luce.

Q. 71. Where was that located?

A. In the vicinity of Empire City, on the shore of Coos Bay. Those coal deposits were considered quite valuable on that land.

Q. 72. Did the company have an agent in Empire City?

A. Yes.

Q. 73. And was he at work developing the resources of the company there?

A. Yes; J. N. Knowles was the first agent.

Q. 74. Did you send him money from time to

time in order to pay the expenses of the work done in Oregon?

A. I did, yes; I sent him \$75,000 at one time and smaller amounts at other times.

Q. 75. Going back to the mortgage for a moment, Mr. Rotch, do you remember the amount of bonds authorized?

A. Two millions.

Q. 76. And those were what, six per cent bonds?

A. They were six per cent bonds.

Q. 77. When were the first coupons due?

A. The first coupon was due six months after the date of the bonds. That would be July 1, 1884.

Q. 78. When July 1 came did you have money enough to pay the interest on those bonds?

A. No, we didn't.

Q. 79. What did you do?

A. The company didn't wish to have a default if it was possible to avoid it, and many of the larger subscribers were asked to take bonds for their coupons. They did this. But to the best of my recollection a number of the bondholders had their coupons paid in cash.

Q. 80. Were all the coupons then paid either in cash or else by the owners taking bonds?

A. They were, to the best of my recollection.

Q. 81. Were you an owner of bonds yourself, Mr. Rotch?

A. Yes; I subscribed to \$5,000 myself and paid for them \$4,000, with 50 shares of stock, I should say.



Q. 82. Now, interest was next payable on January 1, 1885?

A. Yes.

Q. 83. Was that interest paid?

A. No, it was not.

Q. 84. And was interest ever paid after July 1, 1884?

A. No, to the best of my recollection nothing was paid. I know I got no payment on my coupons and I don't think anybody did.

Q. 85. After you ceased to hold the office of treasurer and assistant secretary, which I understand was in August, 1884?

A. Yes.

Q. 86. What connection did you have with the affairs of the company?

A. I had no official connection. My connection was a bondholder and stockholder and representing the large interest which my father had, which was one of the largest, if not the largest interest.

Q. 87. Could you state roughly about what his investment amounted to?

A. It was about \$100,000 finally.

Q. 88. Who succeeded you as treasurer?

A. Prosper W. Smith.

Q. 89. And who succeeded Captain Bèsse as president?

A. Elijah Smith; they were brothers.

Q. 90. Who were they?

A. They were brothers who had got their early business education in New Bedford, and they after-

wards moved to Boston, where Prosper Smith remained until his death, but Elijah Smith went to New York and other places and to the Pacific Coast, and he lived in a great many places all over the country.

Q. 91. Were you well acquainted with those two gentlemen?

A. Yes, very well acquainted. I had been acquainted with them in early life and all my life I knew them well.

Q. 92. After you ceased to be treasurer, was it your custom to consult them as to the affairs of the company?

A. Yes.

Q. 93. Did you keep track of the affairs of the company in a general way?

A. I went into the office of the company very frequently, both in my own interest and as representing my father. I kept in pretty constant touch with the affairs of the company.

Q. 94. Were you also acquainted with Mr. W. W. Crapo?

A. I was very well acquainted with him—of the firm of Crapo, Clifford & Prescott, of New Bedford.

Q. 95. It has appeared, has it not, Mr. Rotch, that your father lived in New Bedford?

A. Yes.

Q. 96. And you were born there?

A. I was born there.

Q. 97. And lived there until you came to Boston in 1880?

A. No; after I graduated at Harvard College I went abroad, in 1865, and graduated from the Ecole Centrale in 1869. Then I came back and remained in New Bedford only about a year and a half, and I went to Fall River and built the Fall River water works, and remained there until 1880. Since 1880 I have been in Boston.

Q. 98. Your earliest associations were with New Bedford?

A. Yes.

Q. 99. And with New Bedford people?

A. Oh, yes; William W. Crapo lived for a number of years in one of my father's houses, which he rented.

Q. 100. Can you name some of the other large investors with whom you were acquainted?

A. Leander A. Plummer, Alexander H. Seabury, George S. Homer.

Q. 101. Were they of New Bedford?

A. All of New Bedford.

Q. 102. Were these gentlemen all then of standing in the community?

A. They were, yes; they were of high standing, all of them, in New Bedford. Most of them had made their money in shipping, the whale fishery, and their fathers before them had left them money from this same source.

Q. 103. Now, do you remember, Mr. Rotch, that this mortgage was foreclosed?

A. I do.

Q. 104. And about when, do you recall?

A. Well, it was about 1887. The proceedings may have begun in 1886, but I think the foreclosure was in 1887.

Q. 105. Do you recall that the trustee, the Boston Safe Deposit & Trust Company, resigned?

A. Yes.

Q. 106. And that William J. Rotch and Edward D. Mandell became trustees in its stead?

A. Yes; Edward D. Mandell was one of the trustees of Hettie Green's property.

Q. 107. Now, you say that you kept pretty close track of the affairs of the corporation on account of your own interest and on account of your father's interest?

A. I did.

Q. 108. Can you tell us why that foreclosure took place, Mr. Rotch?

A. Because the company was unable to pay its obligations.

Q. 109. Was there any other reason that you know of?

A. It was unable to pay its obligations and could obtain no more money to carry on this property.

Q. 110. Were you familiar with the foreclosure proceedings, the course of the foreclosure proceedings?

A. I was, to a great extent.

Q. 111. And do you remember who purchased the property at the foreclosure sale?



A. The property was purchased by, I think, my father and William W. Crapo.

Q. 112. And did they purchase in their own right or for somebody else?

A. No; they were acting for the bondholders in general.

Q. 113. And after they purchased the property was it transferred to a new company?

A. It was.

Q. 114. And what company was that?

A. The Southern Oregon Company.

Q. 115. And that is the defendant in this action, as you understand it?

A. Yes.

Q. 116. Do you remember what stock in the new company was issued to the bondholders, what amount of stock?

A. Yes.

Q. 117. Will you tell us, please?

A. The stockholders in the new Southern Oregon Company, which purchased the property, received a little more stock than was represented by the par value of the bonds. I know I had \$5,000 of the bonds. For the reorganization expenses I paid \$500 and other bondholders paid at the same ratio. That is, \$100 for each thousand-dollar bond. I received 51 and a fraction shares of stock in the Southern Oregon Company and other bondholders received practically the same proportionate amount.

Q. 118. Were there any bonds of that latter company?

A. No.

Q. 119. And that, you say, was about 1887?

A. 1887.

Q. 120. Now, Mr. Rotch, returning to the land which came from the Coos Bay Wagon Road Company, including the Crocker purchase, which was originally a part of the same tract, both those tracts were purchased while you were treasurer?

A. Yes.

Q. 121. Did the company have a report made to it on the title?

A. Yes.

Q. 122. Do you remember who made the report?

A. I can't remember who made it; there was an abstract of title which was very elaborate; I can't remember now who made it.

Q. 123. Some one in Oregon, probably?

A. Yes; our affairs in Oregon—

Q. 124. Well, never mind, Mr. Rotch. I am afraid we will go astray. If you can remember, tell us; if you can't remember, never mind.

A. Well, it was somebody that was recommended by Jonathan Bourne, Jr., who was afterwards senator from Oregon. He was acting as our agent.

Q. 125. You don't recall who it was?

A. No, I don't remember.

Q. 126. Was it reported to you that the company had a good title to this land?

Mr. Smith: I object to that as calling for hearsay testimony, not the best evidence, and ask that

this objection be made in addition to the other objection which I have made.

A. Yes.

Q. 127. Did you know, Mr. Rotch, of any defect in the title?

A. I did not; I had no idea of it.

Q. 128. Did you know that this land came originally from the United States?

A. Yes.

Q. 129. Let me call your attention to the Act of Congress of March 3, 1869, which act provided for a grant of lands to the State of Oregon to aid in the construction of a road built subsequently by the Coos Bay Wagon Road Company, and especially to this provision in the act:

“Provided, further, that the grant of lands hereby made shall be upon the condition that the land shall be sold to any one person only in quantities not greater than one quarter-section and for a price not exceeding \$2.50 per acre.”

At the time of the purchase of those lands did you have any knowledge of that provision in the Act of Congress?

A. No; I never heard anything about it until—

Q. 130. Let us take one step at a time. At the time of the purchase, did you have any such knowledge?

A. No, I had no idea of it; it was never mentioned.

Q. 131. At the time the mortgage was made and executed did you have any such knowledge?

A. No.

Q. 132. Were you one of the officers of the company who executed the mortgage on its behalf?

A. Yes.

Q. 133. Did you have any knowledge of that provision in the act at the time of the foreclosure proceedings?

A. No.

Q. 134. When did you first obtain any knowledge as to that provision?

A. It was perhaps six or seven years ago; I can't remember exactly.

Q. 135. And how did that happen, Mr. Rotch? Do you remember?

A. The company, Southern Oregon Company, was trying to sell its land. It obtained what was considered a good offer, and \$60,000 was paid by the prospective purchaser to bind the bargain. It was reported to the company later that this prospective purchaser had discovered some flaw in the title and he refused to pay any more. The \$60,000 was forfeited to the company and retained by the company. Then I had many interviews with Prosper Smith and Elijah Smith, who then explained to me that it was claimed that people had a right to take a quarter-section and pay \$2.50 an acre. That was the first time I ever heard anything about it.

Q. 136. And that, you say, was six or seven years ago?



A. I can't remember exactly; I think it must have been.

Q. 137. It was, at any rate, long after the foreclosure?

A. Yes; I know it was not ten years ago, but I can't remember the exact date now.

Q. 138. Did you ever hear anything stated from your associates in the company or from the bondholders or stockholders which would lead you to believe that they had any knowledge of such a provision?

Mr. Smith: I object to this especially as calling for a mere conclusion of the witness and not a statement of fact.

(The pending question, No. 138, is read.)

A. No, I never did.

Q. 139. When the mortgage to the Boston Safe Deposit & Trust Company was given, Mr. Rotch, was there any intention on the part of the company or its officers to suffer a foreclosure later in order to get rid of this proviso in the act to which I have referred?

Mr. Smith: I object to this especially for the reason that it calls for a mere conclusion.

A. No; there was nothing of the kind.

Q. 140. Did you ever hear any such suggestion made by any of the officers or persons interested in the company?

A. Never.

Q. 141. Did you hear of any such plan at a later

period when the foreclosure proceedings were actually started?

A. No.

Q. 142. Have you any financial interest in the Southern Oregon Company, Mr. Rotch, at the present time?

A. None.

Q. 143. When did you part with your interest?

A. In 1910 I sold my stock and the stock belonging to the estate of my father and the stock belonging to all of my sisters, who had received some from my father's estate, to Elijah Smith. The money was paid by Kidder, Peabody & Co.

Q. 144. You were executor of your father's estate at that time?

A. Yes.

Q. 145. And acted as executor and agent for your sisters?

A. Yes.

Q. 146. So you have no stock and none of your family have stock, so far as you know?

A. None of the family has any stock today.

Q. 147. There is one more matter, Mr. Rotch, to which I wish to call your attention. Do you remember that at a meeting of the directors while you were treasurer a vote was passed authorizing the issuing of 2,000 shares of stock to Captain William H. Besse for his services?

A. Yes, I kept the minutes of the meeting and I remember that that vote was passed, but there was—

Q. 148. Was there any condition attached to that vote?

A. There was a condition.

Q. 149. Will you state what that condition was?

A. It was voted to issue 2,000 shares of stock to Captain Besse for his services in organizing the company and obtaining this land, which was supposed to be very valuable. The 2,000 were voted to him provided the issue of these 2,000 shares should be approved and ratified by a committee of three men.

Q. 150. And who were the three, do you remember?

A. William W. Crapo was one; I can't remember just who all three were. I think my father was one. William W. Crapo. I can't remember the other one.

Q. 151. Your father and William W. Crapo were two of the three?

A. Yes, but I can't remember the other one.

Q. 152. Did they approve of the issue?

A. They did not.

Q. 153. And was that stock ever issued to Captain Besse?

A. It was never issued.

He further testified that the Oregon Southern Improvement Company was composed of a number of New Englanders, prominent among whom were Elijah Smith, Prosper W. Smith, William Rotch, William J. Rotch, father and son, Capt. W. H. Besse and W. M. Crapo. That Captain

Besse acted for the corporation in the purchase of the Wagon Road lands and another large tract of land in the neighborhood of Coos Bay, known as the Luce lands. Besides this, he purchased a mill and a steamboat costing about \$100,000, as well as other property. That Capt. William H. Besse, the grantee in the deed from Crocker for the 38,867 acres, and in the deed from the Coos Bay Wagon Road Company for the 61,133 acres, was acting in the transaction for the Oregon Southern Improvement Company. That Foster, the timber cruiser, sent out by Crapo, made a voluminous report and that he, Rotch, as treasurer of the company, paid him for his services. All of this was done before the Southern Oregon Improvement Company completed its purchase. That the stock of the last-named company was issued only to the persons who purchased bonds, and that all the bonds were accompanied with stock of the same par value. That prior to the foreclosure proceedings under the trust deed to the Boston Safe Deposit & Trust Company, he and Mandell were substituted as trustees. That the reason for this foreclosure was the company's inability to pay its obligations and to obtain money to carry on the enterprise. The property was purchased at the foreclosure sale by William Rotch, his father, and William Crapo, acting for the bondholders, who, after purchasing, transferred the property to the Southern Oregon Company, which paid for it by issuing corporate stock. The stockholders of the



Southern Oregon Company received a little more stock than was represented by their par value in the bonds of the Oregon Southern Improvement Company. Practically all of the stockholders in the one company were the same as those in the other. He spoke of the foreclosure proceedings and the work of the Southern Oregon Company as the "reorganization" of the Oregon Southern Improvement Company. He also testified that prior to the making of the purchase by the Oregon Southern Improvement Company, it had obtained a report to the effect that the title was good, but he could not give the name of the person making the report; never had any conversation with a lawyer to the effect that the title was good, never saw an opinion from any lawyer upon the subject, and did not examine the abstract himself. Speaking of Mr. Crapo, he said that his father was one of the early pioneers of Oregon and was governor of Michigan and made a large amount of money, which was the foundation of William W. Crapo's fortune in lumber. That Foster, who had been sent out by Crapo to inspect the land, went over the land and made a report to the Oregon Southern Improvement Company, to the best of his recollection. That it was for this service he was paid \$713 by him as treasurer of that company. That Captain Besse was the first to bring the grant lands to the attention of the witness and others associated with him in the Oregon Southern Improvement Company.

Q. And told you, did he not, or wrote you, one

or the other or both, that he had been over the Coos Bay Wagon Road land and that it was desirable land?

A. He told me that, \* \* \* he didn't write me many letters; I think he wrote Mr. Crapo, \* \* \* and gave me personal directions.

Q. When he came here, he reported to you personally?

A. Yes.

Q. And told you what he had seen and described its possibilities?

A. Yes.

Q. You understand, do you not, Mr. Rotch, that a timber cruiser, in dealing with the land, deals with it in very small sections?

A. Yes, I have employed timber cruisers in New Mexico, in land that I was interested in, that belongs to a company of which I am director.

Q. So that when Mr. Foster made his report to you, you understood that he had gone over the land very thoroughly?

A. Yes; he was recommended by Mr. Crapo, and we had confidence in him.

I turned Foster's report over to Prosper W. Smith, because I turned over everything to him that belonged to the company.

He further said that it was believed that all of the stockholders of the Oregon Southern Improvement Company came in and became stockholders of the Southern Oregon Company; but as a matter of fact a few did not do so. In respect to Mr.

Crapo, he said that he was accounted a lawyer of first-class ability. That he and one Stetson were considered the leading lawyers in New Bedford. The abstract showing the title to the Coos Bay Wagon Road lands was submitted to the Oregon Southern Improvement Company, and he had no doubt, he said, that Mr. Crapo saw and examined it. That he saw the abstract showing the patents from the Government, but he left the examination of it to lawyers. He further said that a man by the name of Kenney had agreed to purchase the Coos Bay Wagon Road lands and paid \$60,000 as part of the purchase price. That he refused to complete the contract on the ground that the title was defective, and the money which he had paid was, according to the witness's belief, forfeited to the company.

Whereupon the defendant and appellant called the witness J. A. Yoakam, who testified in substance as follows:

That he has lived in California for the last sixteen years; that previous to that he lived at Coos Bay, around Marshfield. He was there from 1883 to 1897. That during a portion of the time, while he lived at Coos Bay, he was in the employ of the Oregon Southern Improvement Company. That he went in their employ in 1883. That he had charge of their logging and land interests. That he remained in their employ during 1883, 1884, 1885 and until they shut down their business, and had charge of and controlled the timber and the land and the



logging business and had general management of the properties of the company, including settlement of disputes with settlers. Witness testified that he first went into the country with his father long before the building of the Coos Bay Wagon Road. That in order to get into the country they took the road from Jacksonville, where Medford now stands, down through Canyonville to Roseburg, then down the Umpqua to Scottsburg, then by boat to the mouth of the river, and from the river along the beach to a point opposite to Empire. They were then taken across to Empire in a scow. From Roseburg to Scottsburg there was no road. They followed the trail. In those early years there was no mail regularly. If there was any mail gotten it was either by sending a man out into the country, or sending to Garden City, and those who received letters paid 25 cents or 50 cents a letter to have it brought in. No other mail was delivered except letters. After that they got mail once a week, or once in two weeks, until the Coos Bay Wagon Road was built, then once a day. People went in there on account of the excitement over gold in the black sand along the beach. The Oregon Southern Improvement mill was built in 1883 or 1884 by the Oregon Southern Improvement Company. Witness testified that controversies arose between the company and different parties, but never on account of any claim that there was a limitation in the grant, on the right of the company to sell the land.



On this point the witness testified as follows:

Q. Did you know a man named Johnson in there, about whom there was a dispute?

A. Yes.

Q. Do you know what he claimed about his land?

A. Well, he claimed he wasn't going to buy it.

Q. Wouldn't buy it?

A. Wouldn't buy it at any price.

Q. What did he claim about his being on there prior to the survey and therefore would not buy it?

A. He took up the land before it was surveyed.

Q. And state whether or not that was the reason he alleged he would not buy it of the company?

A. Yes, that is the reason he would not buy it; I tried to get him to buy it.

Q. Do you know a man named Richard Houghton in there that there was trouble with about the land?

A. Yes.

Q. What did he claim?

A. He claimed he was out of the three-mile limit.

Q. And that was the reason he would not buy it, that he was outside of the limit, the three-mile grant?

A. Yes.

Q. Do you remember a man named Patrick Smith that you had trouble with about the land?

A. Yes.

Q. What did you have trouble about?

A. He would not buy it; he said it belonged to the Government, and would not give any answer; he would not talk about it; he would not buy it at any price.

Q. Did Smith claim to be there ahead of the survey?

A. Yes; they were, we knew that.

Q. And these people were claiming to be in there ahead of the survey and would not buy at all?

A. Yes; I knew they were ahead of the survey (p. 1128).

\* \* \* \* \*

Q. What were your instructions, Mr. Yoakam, at the time you were acting for the company in the adjustment with these settlers as to whether you should sell the lands or not?

A. My instructions were to sell to every man that wanted to buy that had settled on the property, at any price I could get them to make; to use my judgment entirely, my own judgment, and do the best I could with them; to settle it with them, and sell the property to them if they would take it.

\* \* \* \* \*

Q. Did you follow out those instructions?

A. I did.

Q. Did you endeavor to sell to them?

A. I did endeavor to sell to them, dozens and dozens; I could not sell them, and there was a great many I did sell.

Q. During the time you were having these con-

troversies with the people who had settled upon the land, prior to your coming, did you ever hear from any of them, or from anybody, a claim that there was a condition in this grant compelling the company to sell at \$2.50 an acre and in 160-acre tracts?

A. Never heard such an idea advanced, although I offered to sell for less than that.

Q. But during that time did any of them make that claim?

A. Never.

Q. When did you first hear of that claim?

A. I never heard of that claim until some time within the last year, published in the papers throughout Coos Bay.

Q. A man by the name of Minot, at the time he brought this suit?

A. Yes; at the time he brought the individual suits, because I am well acquainted with Minot and the people he is interested in.

\* \* \* \* \*

Q. Now, Mr. Yoakam, after you get back a mile or a mile and a half from the sloughs or navigable waters where you could log advantageously, I will ask you if the balance of that grant running over the hillside and being timbered and rocky, could have been sold at that time for \$2.50 an acre, and in 160-acre tracts, or for any sum in any quantities?

\* \* \* \* \*

A. No, it could not. You could take up any timber anywhere—take up Government land for nothing, where it was not surveyed at all.

He further testified that in his interview with the settlers on the grant lands, they informed him of the promise of Dr. Hamilton that they would get the land upon which they had settled. His instructions were to sell the lands at such a price as was proper in his judgment. The company which he represented made a general charge of \$10 an acre for bottom land and \$3 an acre for hill land in 1885. He estimated the cost of clearing the bottom land at \$50 an acre and the hill land at \$250 an acre.

Whereupon the defendant called the witness, Geo. S. Gothro, who testified in substance that he was a timber cruiser and had been engaged in that business eight or ten years all over the Pacific Coast as far North as Vancouver Island and as far South as Rogue River. That he is now employed Wenatchee Woodenware Co. That in his experience and work as a cruiser he had occasion to examine the soil and nature of the lands over which he cruised, as to their being cultivable or not, and was qualified to judge that he was familiar with the Coos Bay Wagon Road Company's lands. That he made a cruise of these lands, embraced in the Coos Bay Wagon Road grant, beginning at Roseburg and running west to the top of the mountain. That he cruised over one-fourth section of the Wagon Road Company grant within those limits. That it took him four months to do it, and he made his report to Mr. Herbert Armstrong, representative of the Southern Oregon Company. He



produced and identified Defendant's Exhibits 15 to 52 as the reports made by him to Armstrong. The reports were received and admitted in evidence and numbered defendant's exhibits from exhibit 15 to exhibit 52 inclusive. Witness testified that the legend at the bottom of each exhibit expresses the result of witness' examination of the particular quarter section as to the character of the soil, character and amount of timber, topography, and whether or not the land is cultivable—the contour lines on each exhibit showing the elevation accurately.

The witness further testified that he was employed by the Southern Oregon Company, in the cruise referred to above.

Whereupon the defendant called as a witness C. G. Hockett, who testified in substance that he was secretary of the Southern Oregon Co. and had been such since July, 1911. That R. E. Shine was the secretary before him. That previous to being secretary he was a bookkeeper for the Southern Oregon Co. and as bookkeeper and secretary was familiar with the affairs of the Company and its business. Whereupon he testified as follows:

Q. In answer to the request of the government for a statement as to the amount received by the Company from the sales of lands and sales of timber lands, from forfeited contracts, from leases of lands, from timber used by the Company, from timber depredations, from interest on contracts and from sale of chittim bark, have you made an examination of the books of your Company?

A. Yes, sir.

Q. I will ask you to read it out now so the examiner can get it down. Now from the sale of lands—

A. \$24,500 received. I will read the receipts first.

Q. Yes.

A. From the sale of timber.

Q. From the sale of timber on lands.

A. \$77,621.47. Now that includes both those questions, depredations and sales of land; our books do not designate the two. It is all included as stumpage, which amounts to the same thing.

Q. The answer that you have given as to the amount received from sales of timber on lands includes the amount received from timber depredations?

A. Yes, sir.

Q. As called for by the government?

A. Yes, sir.

Q. And how much was it?

A. \$77,601.47.

Q. From forfeited contracts how much?

A. Nothing.

Q. From lease of lands how much?

A. \$10,937.44.

Q. From timber used by the Company?

A. That is included in the general stumpage account, you know.

Q. What do you mean by general stumpage account?

A. It is counted as stumpage.

Q. From interest or contracts?

A. Nothing.

Q. From sale of chittim bark?

A. \$11,223.01. I want to explain that those chittim bark sales are our leases, or rather our stumpage, I should say instead of leases. There might be a little variation from other lands one way or the other, but it would be slight. Some places there the description of where the stumpage and chittim bark was taken is not given and we would have to—

Mr. GEARIN: It is sufficiently correct I take it.

Mr. SMYTH: Yes.

Q. Now, Mr. Hockett, have you figured out what your books show as to the expense and outlays of the Southern Oregon Co. during the time covered by these items of receipts which you have just read?

A. Yes, sir.

Q. Will you give those facts for the examiner, to be entered in the record?

A. Our accounts show land expenses \$17,229.61.

Q. What is included in the land expense?

A. Well, that includes cruising of the timber, protection of fire and all expenses necessary to protect the timber.

Q. Now the next item.

A. Improvement by lessee, \$1399.05.

Q. Explain what you mean by improvement by lessee.

A. That is where we had improvements made on the land, paid for the same by allowing the man doing the work to use the land for his compensation.

Q. You figured that as a receipt?

A. Yes, sir. We make our leases out and our leases say that he is to pay for this improvement on the land—do so much work on the land, in other words.

Q. What is the next item?

A. Stumpage expense, \$4,477.35.

Q. Explain now what you mean by that?

A. That is for scaling of the logs and looking after them until they are delivered to where—the mill, wherever they go to.

Q. Now the next item?

A. The cost of the chittim bark, \$17,904.42.

Q. Explain how you come at that. What do you mean by the cost of chittim bark?

A. That is exactly what the chittim bark cost us that we sold.

Q. Well, in what way?

A. The buying it and the stumpage.

Q. Cutting it?

A. And baling it.

Q. The expenses attending production?

A. To produce the bark, exactly.

Q. Now what is the next item?

A. General expenses, \$218,207.83.

Q. Now, what period does that cover?



A. That covers the expenses of the general property.

Q. How do you make it up?

A. Well, what do you mean by that, Mr. Gearin?

Q. Well, you figure that now from your books?

A. Yes, sir, that is taken from our books.

Q. And it includes every expense of management and upkeep and administration of the properties, does it?

A. Supposed to, yes, sir. That is, everything that is not designated in different accounts. It is general expenses.

Q. Now, how far does that go back, Mr. Hockett?

A. To 1884.

Q. That is anterior to the Southern Oregon Company. The Southern Oregon Company was incorporated in—

Mr. SMYTH: 1887.

Q. 1887, I think.

A. Our books show that our general expenses of the Southern Oregon Company started about April 1, 1884. I have the books in my possession over in Empire covering that period, they are Southern Oregon books.

Q. They are Southern Oregon books, but the books you testify about now go back to 1884?

A. Yes, sir.

Q. Do the items of receipts testified to by you also go back to 1884?

A. Yes, sir, or wherever they started, from that time.

Q. What I am geeting at is this, Mr. Hockett, in your testimony with reference to the receipts of the company, whether it be the Southern Oregon Company or the Oregon Southern Improvement Company, and expenses of the company, whether it be the Southern Oregon Company or the Oregon Southern Improvement Company, did both begin at the same time?

A. Yes, sir.

Q. That is all. Now, what is your next item?

A. General taxes.

Q. How much?

A. \$325,305.17. In addition to that the 1913 taxes of Douglas County haven't been paid.

Q. Does this item include all that you paid?

A. General taxes, yes, sir. The special road taxes \$5,787.47. In the way of explanation, up until 1902 our books show that the special road and school taxes were segregated from the general taxes. They were collected by road supervisors and school clerks, apparently; at least they are kept separate in the record. School taxes, \$762.90.

Q. Are these special school taxes different from the general state, county and school taxes that are collected at one time, or are these special?

A. These are the same thing only they were not kept with the general tax, you know.

Q. They are not included in that?

A. No. The legal expenses which are not included in the general expense account, \$6,077.15, not

including all of the expense attached to the present suit.

Q. Does it include any expense attached to the present suit?

A. Yes, sir.

Q. Now, what is the next item?

A. Now, there is interest due in the amount of \$218,829.49.

Q. Now, how do you figure that, Mr. Hockett?

A. I figure it on the notes that were given. There was an issue of notes on April 1, 1891, apparently there was \$64,500 worth of six per cent demand notes given. They have run 23 years and 9 months at six per cent, \$91,912.50. On October 1, 1896, there was an issue apparently of \$124,175—

Q. Notes?

A. Yes, sir, demand notes. The accrued interest on those for 18 years and 2 months would be \$135,350.74. That makes the total interest of \$227,263.24. Of that there has been 5 per cent of the principal paid on the interest, that is all there has been paid. In other words, interest for one year on the principal has been paid, that makes \$9,433.75 to be deducted from the total interest; that has been paid. Of course the rest of it has not been paid.

Q. What were those notes given for?

A. To raise money, tried to raise some money and there was some given to pay the treasurer for his salary and anything—

Q. Well, they got the money, did they, on the notes they issued for them?

A. Yes.

Q. And that money was spent?

A. Yes, sir, apparently.

Q. By the company and for the company?

A. Yes.

Q. So that in your estimate there you have figured the interest which has accrued upon the outstanding indebtedness of the company, whether evidenced by notes or howsoever, but you haven't figured anything but the notes?

A. Just the notes, evidenced by interest bearing notes.

Q. Have you figured in that account any interest upon expenditures of the company not evidenced by notes?

A. No, sir.

Q. Now, have you made an addition and summary of the difference between the receipts of the company during the existence of the Southern Oregon Company and going back to 1884, or whatever company it may be, and the expenditures?

A. The actual expenditures or the evidence of indebtedness?

Q. Whatever you have there.

A. \$691,696.52 that we have paid out more than we have received.

Q. Just give the whole amount you have received first and the whole amount you have paid out. The whole amount you have received from all sources.

A. We received \$124,281.92 in the items given here.



Q. And you have paid out not including this interest, how much?

A. Paid out not including the interest?

Q. Have you paid out not including the interest?

A. \$597,148.95.

Q. And the difference then between what you have received and what you paid out is how much?

A. \$472,867.03.

Q. That is the excess of the expenditures over the receipts, is it?

A. Yes, sir, of actual expenditures and receipts. In addition to that there is \$218,829.49 of interest, \$218,829.49 to be added.

Q. Does that include, Mr. Hockett, the original cost of the land?

A. No, sir, it doesn't. I didn't include that for the reason that up to that time I hadn't received anything.

Referring to the statement of receipts and disbursements which he presented in evidence, he said that the item of general expenses included general supervision and other miscellaneous expenses, related not only to the grant lands, but also to other properties of the company, it being impossible he said to segregate the expenses chargeable to the grant lands from that chargeable to the other property. He also testified that in making his estimates he endeavored to get them accurate and in his judgment if there was any error it would not exceed \$5000. He further stated that in Douglas County, up to and including 1908, \$19,419.36 had been paid

as taxes, while the records of Douglas County show that only \$14,409.54, exclusive of the year of 1892, which could not have amounted to over \$510.00, had been paid. Hockett further testified that up to and including 1908, \$152,218.13 had been paid by the company for taxes in Coos County, and that the taxes for 1909 were \$19,154.75, or a total of \$186,292.43 in both counties at the time of the institution of the suit. He said that the item of interest was based upon two notes, one dated April, 1891, and the other October, 1896. Does not this explain the reason for charging this interest item to the grant lands? Says that the item of \$17,000 for "land expense" included cruising, fire protection, etc., of all the lands of the company.

Whereupon defendant called the witness Robert E. Shine, who testified as follows:

Mr. JOHN M. GEARIN: Q. Mr. Shine, state your name, age, residence and occupation.

A. Robert E. Shine, age 57, residence Los Gatos, California. Occupation—I have none at present.

Q. How long have you lived at Los Gatos?

A. About three months.

Q. Were you at any time in the employ of the Southern Oregon Company in Oregon?

A. Yes, sir, from about the year 1888 to the year 1911.

Q. State what your relationship to that company was during those years.

A. I was bookkeeper and secretary and local

manager for about the past ten years in the absence of President Elijah Smith.

Q. How long were you bookkeeper.

A. All the time.

Q. And you had the practical resident management of the company, did you?

A. Yes, especially during the last ten years.

Q. In that capacity was it part of your duty to become familiar with the lands of the Southern Oregon Company?

A. Yes, sir.

Q. Did you examine them from time to time?

A. I did.

Q. You went over the road from Coos Bay to Roseburg and back, did you?

A. Yes, many times.

Q. And did you go off from the road into the mountains and examine the lands?

A. Yes, in the eastern district and the western district, but not in the center of the tract.

Q. Now, along the Coos Bay end of it there are many sloughs and bottom lands?

A. Yes, I have been around all those.

Q. And along the dividing line between Douglas and Coos County are mountain ridges covered with timber?

A. Yes, sir, that is correct.

Q. During the time that you were there, beginning with 1888 and for some years thereafter, I will ask you to state whether there was any demand for timber lands on the mountains?

Mr. CONSTANTINE J. SMYTH: Objected to as calling for the conclusion of the witness; as immaterial, irrevalent and incompetent; and I ask that this objection be treated as made to all questions put to this witness. Is that agreeable?

Mr. GEARIN: That is all right; that need not be repeated; it goes to all the questions that I am going to ask him now.

A. None whatever to my knowledge until the timber values made the land valuable.

Q. About when was that?

A. Let me amend that answer—with very few exceptions.

Q. About when was that that the timber values began to attach to that land?

A. I think about the year 1900, when Eastern buyers came into that part of Oregon.

Q. I will ask you to state whether or not in 1888, when you went there in the employ of the company, the land on the mountains—the timber land—could be sold in 160-acre tracts or smaller tracts to anybody at any price?

A. Not at any price, Mr. Gearin. Money was very scarce in those days, and there was no demand that I ever knew of for timber land.

Q. I will ask you to state whether during your time there in the employ of the company you heard of any defect in the title of the Southern Oregon Company, by reason of a clause in the grant to the company regarding the sale of its lands?

A. Not until about the time the Nicholls suit



was brought and what we call the Seabrook and McKnight gamble was started.

Q. That was about 1905, was it?

A. I think so.

Q. It was about the time of the Nicholls suit anyway. The record shows that. Prior to that you say you heard nothing about it?

A. No, sir. At that time it came like a bolt out of a clear sky, and was a surprise to the company.

Q. You had charge of the books and correspondence of the company?

A. Yes, I had.

Q. I think that is all.

Whereupon the defendant called the witness, Herbert Armstrong, who testified that he was the vice president and general manager of the Southern Oregon Company and had been such since June, 1911, that in that capacity he had charge of the books and papers of the Southern Oregon Company, including books and papers, which passed down to the Southern Oregon Company from the Oregon Southern Improvement Co. Whereupon witness identified book produced and marked "Private Letter Book," purporting to contain letters from October 14, 1884, to August 4, 1887. He testified that it was one of the books in his possession as vice president of the Southern Oregon Company and recognized as being a record of the Oregon Southern Improvement Company and in his possession as such record. Witness says that said book is considered by the Southern Oregon Company as con-

taining letter press copies of letters written by the officers of the company, concerning the company's business. Whereupon witness read from said book defendant's exhibits 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 208, 209, 210, 211, 212 and 213.

The witness thereupon identified defendant's exhibit 214 as being one of the records of the Southern Oregon Company and being an original letter book of the Southern Oregon Co., containing letters from May 26, 1887, to June 11, 1903; that it was in his possession as vice president and was considered by the company as containing letter press copies of the letters as indicated and it was a part of the records of the Southern Oregon Company.

Whereupon defendant read into the records from said book the following letters:

Page 8, Elijah Smith to C. A. Dolph, dated June 20, 1887.

Page 10 $\frac{1}{2}$ , Elijah Smith to Geo. W. Loggie, dated July 1, 1887.

Page 11, Elijah Smith to C. A. Dolph, dated July 1, 1887.

Page 16, E. W. Smith to C. A. Dolph, dated July 25, 1887.

Page 18, Wm. J. Rotch and Edw. D. Mandell, trustees, to C. A. Dolph, dated June 30, 1887.

Whereupon the

Page 22, Wm. J. Crapo and Wm. J. Rotch—Letters of first mortgage bonds, dated August 15, 1887.

Page 30, E. W. Smith to J. M. Merrill, Septem-

ber 5, 1887. E. W. Smith to C. A. Dolph, Oct. 7, 1887.

Page 37, E. W. Smith to Chas. W. Plummer, Nov. 5, 1887.

Page 41, E. W. Smith to W. W. Crapo, Nov. 25, 1887.

Page 49, E. W. Smith to Geo. W. Loggie, Jan. 14, 1888.

Page 59, E. W. Smith to John M. Howard, March 19, 1888.

Page 62 and 63—List of stockholders of the Oregon Southern Improvement Co., June 12, 1884.

Page 94—Statement of payment for Coos Bay Wagon Road Lands.

Page 155—Trial balance of date August 7, 1884.

Pages 498-99, E. W. Smith to Barnabas Holmes, May 24, 1887.

The witness Armstrong further stated that he had received a good many applications to purchase bottom lands, but had sold no land. That he had no authority from his company to sell grant lands, and that such authority was necessary before he could do so.

That he understood an agreement existed between attorneys for the government and Southern Oregon Company that no lands could be sold during pendency of suit.

Whereupon the defendant handed the witness certified copy of the records of the Board of Land Commissioners of the State of Oregon, showing disposition of the School Sections within the limits

of the Coos Bay Wagon Grant, marked defendant's exhibit 216 and in reference thereto the witness stated that he was familiar with the nature and character and location of the different school sections within the limits of the Coos Bay Wagon Road Grant, Section 16, Twp. 26 South, Range 12 West; that this section lies at the head of what is known as Coal Bank. Part of it comes right on the slough bottom and part of it is on the side hill and joins the old coal mine that was opened up in an early day; being one of the first openings of coal in the county. This whole section is supposed to be coal land. Part of it is owned now by the coal company. Section 36 in this township and range lies between the navigable waters of Thomas Slough and Catching Slough. Part of it was covered with timber, but was about three-fourths of a mile from the slough and very handy to tidewater.

Witness knows of Section 16, 36 in Twp. 37 South, 13 West. Part of Section 16 comes in between the headwaters of Beaver Slough and the headwaters of Isthmus Slough and right on the old trail where all the traffic went through in the early days. They could boat up to within about  $1\frac{1}{2}$  miles of it. All the traffic that went into Coquille and Coos Bay went through there. Part of it is in the bottom and part of it is covered with timber. Section 36 in this township is partly in the city of Coquille, down in the bottom country. Cunningham creek runs into the Coquille south of Section 36.

Witness knows the location of Section 16, 36 in



Township 26 South, and the character of the land. Section 16 comes in on the edge of Catching Slough. About one-half of the way between Sumner and Marshfield there is a long stretch of very fine bottom land on it that comes up the West side.

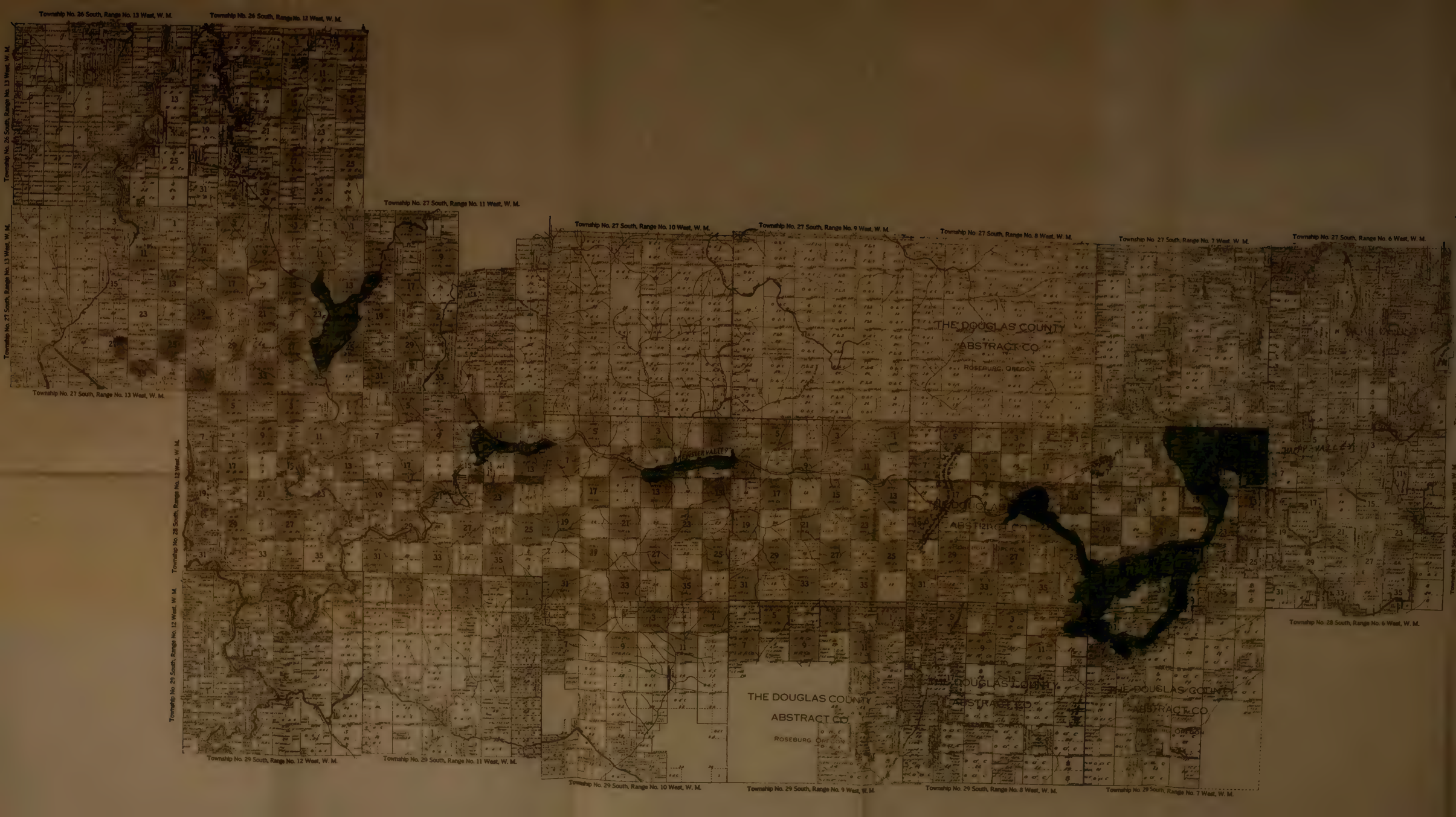
Section 36 lies right on the Coquille River bottom, right on tidewater. Witness thinks the best farm in Coos County is on it.

Witness knows the location of Section 16, 36 in Township 39, 8 West, Section 16 lies on the edge of Camas Prairie—a big, open, natural prairie, beautiful bottom land, and settled very early. Witness knows the location of Section 36, 29 South, 9 West, and the character of the land. It is bottom land. About one-half of it comes into Camas Prairie and one-half of it is timber land.

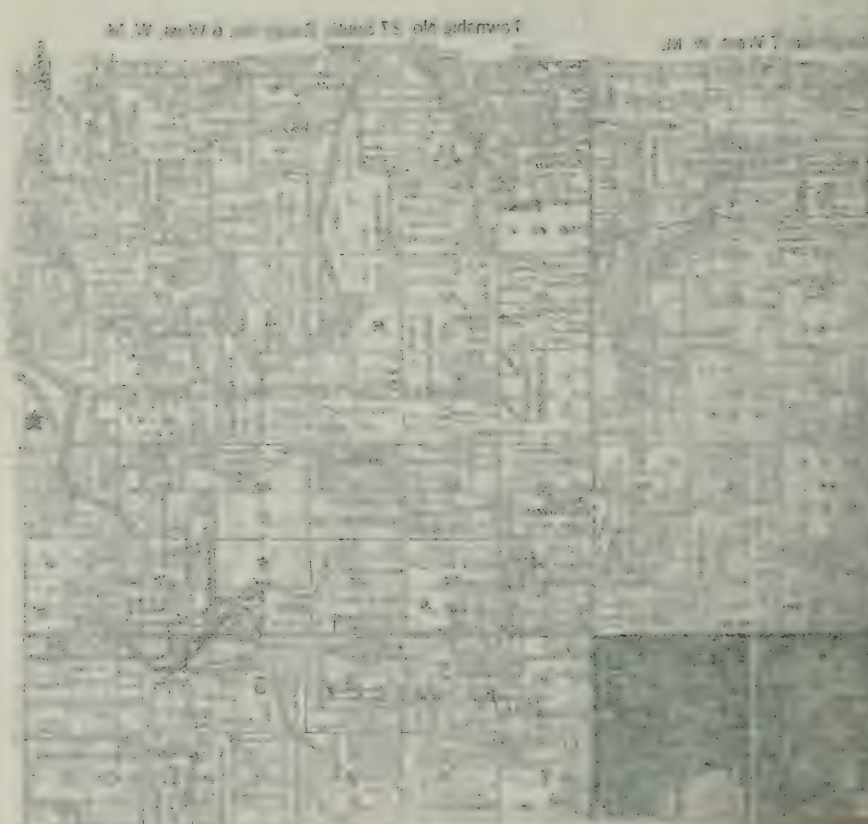
Witness thereupon read from the letter book of the Oregon Southern Improvement Company, identified by him as such, letter found on page 227 of letter book from W. P. Metcalf, dated April 14, 1885, marked defendant's exhibit 217.

Whereupon the witness produced a map of the lands of the Southern Oregon Co., showing in colors the bottom lands and the other lands not bottom. Witness testified that the bottom lands were tinted in green and those not bottom tinted in red; that he and Mr. Gothro prepared the map and that it was substantially correct. Whereupon defendant introduced said map in evidence as exhibit 218, which exhibit is hereto attached and is in words and figures as follows, to wit:

Defendant's Exhibit 218.









E $\frac{1}{2}$  SE $\frac{1}{4}$ , Joseph Wagner, Aug. 19, 1873, Cash Deed.

Balance of Section, Base.

T. 26 S. R. 12 W.

Section 16:

W $\frac{1}{2}$  NE $\frac{1}{4}$ , NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Jane Kinney, May 1, 1889.

SE $\frac{1}{4}$  NE $\frac{1}{4}$ , G. B. Howe, Nov. 3, 1899.

E $\frac{1}{2}$  NW $\frac{1}{4}$ , NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Lot 4, Aug. C. Kinney, Sept. 2, 1874, Cash Deed.

SE $\frac{1}{4}$ , D. S. Palmauteer, Mar. 14, 1874, Cash Deed.

Lots 1, 2, 3, Joel Jenkins, Mar. 27, 1876, Cash Deed.

Lot 4 also used as base; SE $\frac{1}{4}$  SW $\frac{1}{4}$  used as base.

Section 36:

NW $\frac{1}{4}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  of NW $\frac{1}{4}$ , Geo. F. Johnson, Jan. 24, 1890, Cash Deed.

NW $\frac{1}{4}$  SW $\frac{1}{4}$ , M. W. Smith, Jan. 4, 1890, Cash Deed.

NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Ella M. Shipley, Jan. 9, 1890.

NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Wm. F. Rose, Jan. 3, 1890.

E $\frac{1}{2}$  SW $\frac{1}{4}$ , A. J. Stevens, Jan. 14, 1890.

SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Eliza R. Barchus, Jan. 2, 1890.

S $\frac{1}{2}$  NE $\frac{1}{4}$ , W $\frac{1}{2}$  NW $\frac{1}{4}$ , Martin Gay, Nov. 3, 1899.

SE $\frac{1}{4}$ , Nora Bunell, Nov. 12, 1891.

T. 25 S. R. 12 W.

Section 16:

W $\frac{1}{2}$  SW $\frac{1}{4}$ , Robert E. Shine, Apr. 17, 1901.

S $\frac{1}{2}$  SE $\frac{1}{4}$ , SE $\frac{1}{4}$  SW $\frac{1}{4}$ , R. E. Shine, May 25, 1901.

NW $\frac{1}{4}$ , Bennett Swanton, Nov. 11, 1910.

NE $\frac{1}{4}$ , Arthur McKeown, Nov. 11, 1910.

NE $\frac{1}{4}$  SW $\frac{1}{4}$ , N $\frac{1}{2}$  SE $\frac{1}{4}$ , Harry Winkler, Nov. 11, 1910.

Section 36:

NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Anson Rogers, Apr. 20, 1883, Cash Deed.

NW $\frac{1}{4}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Anson Rogers, July 17, 1874, Cash Deed.

Lots 6, 7, 8, 9, 10, Nathan Smith, July 8, 1872, Cash Deed.

S $\frac{1}{2}$  SW $\frac{1}{4}$ , Nathan Smith, Jan. 29, 1889.

SW $\frac{1}{4}$  SE $\frac{1}{4}$ , T. B. Shelhammer, Jan. 31, 1890.

N $\frac{1}{2}$  NW $\frac{1}{4}$ , Lots 1, 2, 3, 4, 5, Base.

**T. 27 S. R. 12 W.**

Section 16:

NW $\frac{1}{4}$  NW $\frac{1}{4}$ , NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Oscar R. Vesch, May 17, 1900.

E $\frac{1}{2}$  NW $\frac{1}{4}$ , SW $\frac{1}{4}$  NW $\frac{1}{4}$ , NW $\frac{1}{4}$  SW $\frac{1}{4}$ , C. C. Collins, Peter Laig & Hugh B. Laig, Nov. 14, 1906.

S $\frac{1}{2}$  SW $\frac{1}{4}$ , William Dingman, Oct. 3, 1874, Cash Deed.

SE $\frac{1}{4}$ , Geo. W. Loggie, May 1, 1889, Cash Deed.

NE $\frac{1}{4}$ , Andrew Nasburg, Sept. 8, 1875, Cash Deed.

Section 36:

NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Theo. T. Burkhart, April 10, 1890.

S $\frac{1}{2}$  NW $\frac{1}{4}$ , N $\frac{1}{2}$  SW $\frac{1}{4}$ , SW $\frac{1}{4}$  SW $\frac{1}{4}$ , James Sargent, March 25, 1890.

W<sup>1</sup>/<sub>2</sub> NE<sup>1</sup>/<sub>4</sub>, SE<sup>1</sup>/<sub>4</sub> NE<sup>1</sup>/<sub>4</sub>, Richard J. Coke, July 30, 1889.

N<sup>1</sup>/<sub>2</sub> NW<sup>1</sup>/<sub>4</sub>, N. Brothers, Cash Deed, April 25, 1877.

SE<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub>, SW<sup>1</sup>/<sub>4</sub> SE<sup>1</sup>/<sub>4</sub>, Julius Volheye, April 10, 1890, Cash Deed.

N<sup>1</sup>/<sub>2</sub> SE<sup>1</sup>/<sub>4</sub>, Albertine E. Finck, April 10, 1890, Cash Deed.

SE<sup>1</sup>/<sub>4</sub> SE<sup>1</sup>/<sub>4</sub>, Julius Volheye, April 12, 1890, Cash Deed.

T. 27 S. R. 6 W.

Section 16:

Lot 12, Henry Conn, Sr., Dec. 12, 1881, Cash Deed.

SW<sup>1</sup>/<sub>4</sub>, A. R. Flint, March 30, 1872, Cash Deed.

Lots 7, 8, 10, 11, George W. Jones, July 18, 1871, Cash Deed.

Lots 5 and 6, J. Turner.

(Balance of Sec. appropriated by government.)

Section 36:

Lots 1, 2, 9, 10, E. F. Sheridan, Jan. 25, 1888, Cash Deed.

Lots 4 and 7, David Bushy, June 10, 1872, Cash Deed.

E<sup>1</sup>/<sub>2</sub> E<sup>1</sup>/<sub>2</sub>, B. F. Mathews, Feb. 3, 1872, Cash Deed.

W<sup>1</sup>/<sub>2</sub> NE<sup>1</sup>/<sub>4</sub>, Lots 3 and 8, Thomas P. Sheridan, Feb. 28, 1871, Cash Deed.

Lot 6, James F. Sheffield, June 20, 1873, Cash Deed.

(Balance of Section appropriated by government.)

**T. 27 S. R. 7 W.**

**Section 16:**

N $\frac{1}{2}$  NW $\frac{1}{4}$ , Lots 2, 3, 4, William J. Lander, Feb. 16, 1889, Cash Deed.

Lots 5, 6, 7, Ulyess Flournoy, Oct. 22, 1900.

(Cancelled as to Lot 7.)

**Section 36:**

W $\frac{1}{2}$  SW $\frac{1}{4}$  (Pencil notation "M. Withers, 1865").

W $\frac{1}{2}$  NW $\frac{1}{4}$ , Peter W. Williams, Jan. 20, 1871, Cash Deed.

E $\frac{1}{2}$  NW $\frac{1}{4}$ , A. S. Coston, May 16, 1869, Cash Deed.

(Balance of 16 and 36 appropriated by government, including Lot 7 of Sec. 16.)

**T. 27 S. R. 8 W.**

**Section 16:**

W $\frac{1}{2}$ , J. P. Watson, July 5, 1899.

E $\frac{1}{2}$ , Mary Osborn, July 5, 1899.

**Section 36:**

NW $\frac{1}{4}$ , W $\frac{1}{2}$  NE $\frac{1}{4}$ , NE $\frac{1}{4}$  NE $\frac{1}{4}$ , George P. Withers, Nov. 3, 1899.

NW $\frac{1}{4}$  SW $\frac{1}{4}$ , W. W. Campbell, Nov. 3, 1899.

SE $\frac{1}{4}$ , E. F. Shistler, Feb. 12, 1875, Cash Deed.

S $\frac{1}{2}$  SW $\frac{1}{4}$ , NE $\frac{1}{4}$  SW $\frac{1}{4}$ , SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Harrison Beezley, Feb. 12, 1875, Cash Deed.

**T. 28 S. R. 6 W.**

**Section 16:**

N $\frac{1}{2}$ , John T. McBee, March 14, 1882, Cash Deed.

S $\frac{1}{2}$ , James A. Velzian, April 8, 1891, Cash Deed.



Section 36:

N $\frac{1}{2}$  NE $\frac{1}{4}$ , E $\frac{1}{2}$  NW $\frac{1}{4}$ , Thomas B. Burnitt, May 9, 1872, Cash Deed.

W $\frac{1}{2}$  W $\frac{1}{2}$ , James D. Burnett, Nov. 29, 1873, Cash Deed.

SE $\frac{1}{4}$  NE $\frac{1}{4}$ , NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Mary E. Burnett, July 27, 1874, Cash Deed.

E $\frac{1}{2}$  SW $\frac{1}{4}$ , NW $\frac{1}{4}$  SE $\frac{1}{4}$ , SW $\frac{1}{4}$  NE $\frac{1}{4}$ , James D. Burnett, Jan. 14, 1878, Cash Deed.

S $\frac{1}{2}$  SE $\frac{1}{4}$ , T. W. Hervey, Oct. 16, 1877, Cash Deed.

T. 28 S. R. 7 W.

Section 16:

E $\frac{1}{2}$  NE $\frac{1}{4}$ , NW $\frac{1}{4}$  SE $\frac{1}{4}$ , L. D. Henderson, May 16, 1890, Cash Deed.

N $\frac{1}{2}$  NW $\frac{1}{4}$ , W $\frac{1}{2}$  NE $\frac{1}{4}$ , F. M. Strickland. Feb. 14, 1876, Cash Deed.

S $\frac{1}{2}$  NW $\frac{1}{4}$ , NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Richard Morris, July 18, 1872, Cash Deed.

NE $\frac{1}{4}$  SW $\frac{1}{4}$ , S $\frac{1}{2}$  SE $\frac{1}{4}$ , Anton Sonnenfeld, Sept. 24, 1890, Cash Deed.

S $\frac{1}{2}$  SW $\frac{1}{4}$ , Arthur Hedley, Jan. 27, 1890, Cash Deed.

NE $\frac{1}{4}$  SE $\frac{1}{4}$ , F. M. Strickland, Aug. 26, 1879, Cash Deed.

Section 36:

N $\frac{1}{2}$  N $\frac{1}{2}$ , James Davlin, July 6, 1871, Cash Deed.

S $\frac{1}{2}$  N $\frac{1}{2}$ , J. J. McCullough, July 8, 1872, Cash Deed.

S $\frac{1}{2}$  S $\frac{1}{2}$ , Wm. N. McCullough, June 10, 1872, Cash Deed.

N $\frac{1}{2}$  S $\frac{1}{2}$ , Robt. T. McCullough, June 10, 1872,  
Cash Deed.

**T. 28 S. R. 8 W.**

**Section 16:**

NE $\frac{1}{4}$  NE $\frac{1}{4}$ , S. M. Brooks, Jan. 30, 1903.

SE $\frac{1}{4}$  NE $\frac{1}{4}$ , George Wilson, Jan. 27, 1882.

W $\frac{1}{2}$  NE $\frac{1}{4}$ , George Wilson, March 29, 1889.

E $\frac{1}{2}$  NW $\frac{1}{4}$ , E. A. Anderson, Sept. 16, 1889, Cash  
Deed.

W $\frac{1}{2}$  NW $\frac{1}{4}$ , Mrs. W. H. Fisher, June 12, 1890,  
Cash Deed.

S $\frac{1}{2}$ , W. H. Fisher, June 12, 1890, Cash Deed.

**Section 36:**

Lots 1, 2, 3, NW $\frac{1}{4}$  NW $\frac{1}{4}$ , J. D. Smith, Dec. 16,  
1872, Cash Deed.

S $\frac{1}{2}$  NW $\frac{1}{4}$ , W $\frac{1}{2}$  SW $\frac{1}{4}$ , William Irwin, June  
20, 1873, Cash Deed.

(Balance of Section appropriated by govern-  
ment.)

**T. 29 S. R. 7 W.**

**Section 16:**

E $\frac{1}{2}$ , Eliza J. Sheppard, March 3, 1903.

E $\frac{1}{2}$  SW $\frac{1}{4}$ , Frank H. Sheppard, March 3, 1903.

E $\frac{1}{2}$  NW $\frac{1}{4}$ , Jarvis M. Green, April 4, 1890.

NW $\frac{1}{4}$  NW $\frac{1}{4}$ , G. A. Darling, May 9, 1900.

SW $\frac{1}{4}$  NW $\frac{1}{4}$ , W $\frac{1}{2}$  SW $\frac{1}{4}$ , Wm. R. Wells, July 17,  
1874, Cash Deed.

**Section 36:**

W $\frac{1}{2}$  NE $\frac{1}{4}$ , C. S. Jackson, March 12, 1912.

S $\frac{1}{2}$ , SE $\frac{1}{4}$ , J. J. Crawford, David Thompson, Oct.  
3, 1874, Cash Deed.

310 *United States vs. Southern Oregon Company*

NW $\frac{1}{4}$ , N $\frac{1}{2}$  SW $\frac{1}{4}$ , NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Lot 6 used as base.

Lots 1, 2, 3 and 7 vacant.

T. 29 S. R. 8 W.

Section 16:

E $\frac{1}{2}$ , D. W. Knowles, Nov. 3, 1899.

E $\frac{1}{2}$  W $\frac{1}{2}$ , John L. Colfax, Nov. 3, 1899.

NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Peter Burch, Nov. 25, 1889, Cash Deed.

W $\frac{1}{2}$  NW $\frac{1}{4}$ , James A. Kirkendall, Oct. 8, 1880, Cash Deed.

SW $\frac{1}{4}$  SW $\frac{1}{4}$ , A. Patterson, 1865 (Pencil notation).

Section 36:

NE $\frac{1}{4}$ , Ralph S. Baird, May 3, 1902.

NW $\frac{1}{4}$ , Ralph S. Baird, May 3, 1902.

SW $\frac{1}{4}$ , L. H. Sykes, May 3, 1902.

SE $\frac{1}{4}$ , L. H. Sykes, May 3, 1902.

T. 29 S. R. 9 W.

Section 16:

Appropriated by the government.

Section 36:

Lot 1, William P. Day, Nov. 3, 1871, Cash Deed.

NE $\frac{1}{4}$  NW $\frac{1}{4}$ , C. D. Cary, March 6, 1889, Cash Deed.

S $\frac{1}{2}$  NE $\frac{1}{4}$ , V. L. Arrington, Apr. 27, 1889, Cash Deed.

N $\frac{1}{2}$  SE $\frac{1}{4}$ , Neil Macaulay, May 1, 1889, Cash Deed.

NW $\frac{1}{4}$  NW $\frac{1}{4}$ , F. M. Kenyon, Nov. 25, 1881, Cash Deed.

N $\frac{1}{2}$  SW $\frac{1}{4}$ , Mary A. Looney, Jan. 4, 1884, Cash Deed.

S $\frac{1}{2}$  SW $\frac{1}{4}$ , H. Spencer French, Jan. 4, 1884, Cash Deed.

S $\frac{1}{2}$  SE $\frac{1}{4}$ , Julia Abraham, June 9, 1890, Cash Deed.

NW $\frac{1}{4}$  NE $\frac{1}{4}$ , M. Thompson, 1864.

S $\frac{1}{2}$  NW $\frac{1}{4}$ , C. L. Hamilton, April 27, 1889, Cash Deed.

(9.36 acres used as base.)

T. 26 S. R. 12 W.

Section 16:

N $\frac{1}{2}$  NE $\frac{1}{4}$ , SW $\frac{1}{4}$  NE $\frac{1}{4}$ , Jane Kinney, May 1, 1889.

SE $\frac{1}{4}$  NE $\frac{1}{4}$ , G. B. Howe, Nov. 3, 1899.

E $\frac{1}{2}$  NW $\frac{1}{4}$ , NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Lot 4, Aug. C. Kinney, Sept. 2, 1874, Cash Deed.

Lots 1, 2, 3, Joel Jenkins, March 27, 1876, Cash Deed.

SE $\frac{1}{4}$  SW $\frac{1}{4}$ , used as base.

SE $\frac{1}{4}$ , D. S. Palmanteer, March 14, 1874, Cash Deed.

Lot 4 also used as base.

Section 36:

NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Ella M. Shipley, Jan. 9, 1890.

NW $\frac{1}{4}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  NW $\frac{1}{4}$ , George F. Johnson, Jan. 24, 1890, Cash Deed.

S $\frac{1}{2}$  NE $\frac{1}{4}$ , W $\frac{1}{2}$  NW $\frac{1}{4}$ , Martin Gay, Nov. 3, 1899.

NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Wm. F. Rose, Jan. 3, 1890.

NW $\frac{1}{4}$  SW $\frac{1}{4}$ , M. W. Smith, Jan. 4, 1890, Cash Deed.



SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Eliza R. Barchus, Jan. 2, 1890.

E $\frac{1}{2}$  SW $\frac{1}{4}$ , A. J. Stevens, Jan. 14, 1890.

SE $\frac{1}{4}$ , Nora Bunnell, Nov. 12, 1891.

T. 27 S. R. 11 W.

Section 16:

NE $\frac{1}{4}$ , Charles W. Tower, Aug. 23, 1884.

NW $\frac{1}{4}$ , John Church, Sept. 2, 1884.

SW $\frac{1}{4}$ , Robert Edward Shine, Dec. 11, 1888, Cash  
Deed.

SE $\frac{1}{4}$ , B. C. Shull, Apr. 18, 1879, Cash Deed.

Section 36:

N $\frac{1}{2}$ , J. J. Foster, Nov. 3, 1899.

SW $\frac{1}{4}$ , Geo. Bamford, Feb. 11, 1891.

SE $\frac{1}{4}$ , Amanda K. Knowles, Nov. 3, 1899.

T. 28 S. R. 8 W.

Section 16:

NE $\frac{1}{4}$  NE $\frac{1}{4}$ , S. M. Brooks, Jan. 30, 1903.

SE $\frac{1}{4}$  NE $\frac{1}{4}$ , George Wilson, Jan. 27, 1882.

W $\frac{1}{2}$  NE $\frac{1}{4}$ , George Wilson, March 29, 1889.

E $\frac{1}{2}$  NW $\frac{1}{4}$ , E. A. Anderson, Sept. 16, 1889, Cash  
Deed.

W $\frac{1}{2}$  NW $\frac{1}{4}$ , Mrs. W. H. Fisher, June 12, 1890,  
Cash Deed.

S $\frac{1}{2}$ , W. H. Fisher, June 12, 1890, Cash Deed.

Section 36:

Lots 1, 2, 3, NW $\frac{1}{4}$  NW $\frac{1}{4}$ , J. D. Smith, Dec. 16,  
1872, Cash Deed.

S $\frac{1}{2}$  NW $\frac{1}{4}$ , W $\frac{1}{2}$  SW $\frac{1}{4}$ , William Irwin, June  
June 20, 1873.

Remainder of Section used as base.

**T. 28 S. R. 9 W.**

**Section 16:**

E $\frac{1}{2}$ , Henry Servis, Nov. 3, 1899.

W $\frac{1}{2}$ , N. V. Sorenson, Jan. 22, 1907.

**Section 36:**

N $\frac{1}{2}$ , George G. Shores, Nov. 3, 1899.

SW $\frac{1}{4}$ , W $\frac{1}{2}$  SE $\frac{1}{4}$ , NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Nels Swanson,  
Nov. 3, 1899.

SE $\frac{1}{4}$  SE $\frac{1}{4}$ , E. H. Thrush, Jan. 10, 1888.

**T. 28 S. R. 10 W.**

**Section 16:**

N $\frac{1}{2}$ , Jas. Harrison, Nov. 3, 1899.

SW $\frac{1}{4}$ , John L. Colfax, Nov. 3, 1899.

N $\frac{1}{2}$  SE $\frac{1}{4}$ , SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Amanda K. Knowles,  
Nov. 3, 1899.

SE $\frac{1}{4}$ , SE $\frac{1}{4}$ , C. B. Marsters, Oct. 22, 1879.

**Section 36:**

E $\frac{1}{2}$ , C. W. Blake, Nov. 3, 1899.

W $\frac{1}{2}$ , Ida B. Peters, Aug. 27, 1902.

**T. 28 S. R. 11 W.**

**Section 16:**

NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Amanda K. Knowles, Nov. 3, 1899.

NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Nels Swanson, Nov. 3, 1899.

SW $\frac{1}{4}$  NE $\frac{1}{4}$ , G. B. Howe, Nov. 3, 1899.

SE $\frac{1}{4}$  NE $\frac{1}{4}$ , W $\frac{1}{2}$  SE $\frac{1}{4}$ , Richard Walter, Apr.  
20, 1889, Cash Deed.

W $\frac{1}{2}$ , Emma J. Devine, Aug. 20, 1889.

E $\frac{1}{2}$  SE $\frac{1}{4}$ , Provit Dean, May 19, 1883, Cash Deed.

**Section 36:**

N $\frac{1}{2}$  NE $\frac{1}{4}$ , A. F. Raynor, Apr. 30, 1890.

SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Nellie J. Beswick, April 30, 1890.

314 *United States vs. Southern Oregon Company*

SW $\frac{1}{4}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Wm. E. Weekley, Apr.  
18, 1878, Cash Deed.

SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Paul Coke, Feb. 25, 1885.

N $\frac{1}{2}$  NW $\frac{1}{4}$ , W $\frac{1}{2}$  SW $\frac{1}{4}$ .

SE $\frac{1}{4}$  SW  $\frac{1}{4}$ , SW $\frac{1}{4}$  SE $\frac{1}{4}$ , J. W. Bennett, Feb. 1,  
1889, Cash Deed.

NE $\frac{1}{4}$  SW $\frac{1}{4}$ , NW $\frac{1}{4}$  SE $\frac{1}{4}$ , John H. Miller, June  
11, 1887.

E $\frac{1}{2}$  SE $\frac{1}{4}$ , Lucius A. Brown, Apr. 30, 1890.

T. 28 S. R. 12 W.

Section 16:

N $\frac{1}{2}$  NE $\frac{1}{4}$ , James Blodget, March 16, 1888, Cash  
Deed.

S $\frac{1}{2}$  NE $\frac{1}{4}$ , W $\frac{1}{2}$  SE $\frac{1}{4}$ , Francis M. Garrison,  
Aug. 11, 1888.

NW $\frac{1}{4}$ , W. Lloyd Cox, May 24, 1899, Cash Deed.

SW $\frac{1}{4}$ , G. B. Howe, Nov. 3, 1899.

E $\frac{1}{2}$  SE $\frac{1}{4}$ , A. M. Crawford, Aug. 11, 1888.

Section 36:

NE $\frac{1}{4}$  NE $\frac{1}{4}$ , J. M. Bright, Jan. 6, 1885.

SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Modest Maryanski, Apr. 28, 1890.

W $\frac{1}{2}$  NE $\frac{1}{4}$  and Lot 3, J. M. Bright, Jan. 25, 1877,  
Cash Deed.

Lot 1, Base.

Lot 2, Robert Willis, Jan. 25, 1877, Cash Deed.

Lots 8, 9, SW $\frac{1}{4}$ , NW $\frac{1}{4}$ , G. D. Hobson, Feb. 20,  
1877, Cash Deed.

Lots 4, 5, 6, 7 and NW $\frac{1}{4}$  SW $\frac{1}{4}$ , James S. Bright,  
Jan. 25, 1877, Cash Deed.

NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Kate L. Schuck, Apr. 8, 1890.

NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Kate L. Schuck, Apr. 8, 1890, Cash Deed.

SW $\frac{1}{4}$  SE $\frac{1}{4}$ , William A. Bright, July 2, 1888.

SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Julius Volheye, Apr. 4, 1890, Cash Deed.

Tide Lands fronting Lots 2, 3, 4, 5, J. H. Schroder, Apr. 5, 1876, Cash Deed.

T. 29 S. R. 10 W.

Section 16:

E $\frac{1}{2}$ , Eugene Harper, Aug. 24, 1889.

W $\frac{1}{2}$ , Charles N. Devine, Aug. 24, 1889.

Section 36:

E $\frac{1}{2}$ , Henry Herzer, Aug. 28, 1889 (NE $\frac{1}{4}$  also claimed by U. S.).

NW $\frac{1}{4}$ , G. Edward Webb, Sept. 26, 1889 (also claimed by U. S.).

NE $\frac{1}{4}$  SW $\frac{1}{4}$ , A. R. Kanaga, May 22, 1890 (also claimed by U. S.).

Lots 6, 7 and SE $\frac{1}{4}$  SW $\frac{1}{4}$ , claimed by the U. S.

Whereupon defendant called the witness H. A. Fargeter, who identified exhibits 1 to 14 as being correct maps of the land in the Coos Bay Wagon Road grant, showing all the entries—those cancelled as well as the live entries. The said maps are omitted from this Abstract of Record, but the originals are sent to the Court of Appeals and it is certified that the following is a correct summary of what said exhibits show:



## SUMMARY BY TOWNSHIP AND RANGE.

Number of Entries.

		Between		Between	Since
		Prior	1875	1880	1890
Township.	Range.	to 1875.	and 1880.	and 1890.	1890
25 South,	7 West...	23	3	9	26
28 South,	8 West...	10	3	5	52
29 South,	8 West...	4	4	9	23
28 South,	9 West...	..	1	..	65
29 South,	9 West...	2	2	2	35
28 South,	10 West...	..	3	4	47
29 South,	10 West...	..	..	1	22
27 South,	11 West...	..	3	17	28
28 South,	11 West...	..	6	17	51
26 South,	12 West...	14	20	26	25
27 South,	12 West...	5	12	26	35
28 South,	12 West...	15	10	24	38
26 South,	13 West...	10	4	..	1
27 South,	13 West...	29	12	9	1
		112	82	149	349

Whereupon defendant introduced in evidence exhibit 190, consisting of certified copies of the following papers:

1. Copy of letter dater September 19, 1872, from L. F. Grover, Governor of the State of Oregon, to Columbus Delano, Secretary of the Interior, transmitting copy of map of the Coos Bay Wagon Road from the 24th to the 44th mile and certifying that the same was completed in accordance with the Act of Congress, approved March 3, 1869, which copy is

certified to by Commissioner of the General Land Office.

2. Map of definite location of the Coos Bay Wagon Road, certified and sworn to Sept. 14, 1872, by A. R. Flint, Surveyor; certified to also by Aaron Rose, president of the Coos Bay Wagon Road Co., which certificate of Aaron Rose declares the road to be completed and approved by the Road Committee, and to which is attached also certificate of L. F. Groves, Governor, and S. F. Chadwick, Secretary of the State of Oregon, certifying that the said map, dated September 19, 1870, has been filed in the office of the Governor of the State of Oregon by the Road Company, showing the completion of the said road from the navigable waters of Coos Bay to Roseburg, lying between a point 24 miles and 41 chains from the Western terminus of said road and the 44th mile post.

3. Copy of letter dated December 28, 1870, from W. F. Otto, Acting Secretary of the Interior and Commissioner of the General Land Office.

4. Copy of certificate of L. F. Grover, Governor of the State of Oregon, dated December 10, 1870, certifying that eighteen continuous miles of said road beginning at Roseburg and running in a West-erly direction, terminating at the 18th mile post, have been completed, according to the requirements of said Act of Congress, of date March 3, 1869.

5. Copy of letter of L. F. Grover, Governor of the State of Oregon, to Columbus Delano, Secretary of the Interior, of date October 4, 1872, transmit-

ting copy of map of the Coos Bay Wagon Road Co. from Isthmus Slough to the Western terminus of said road twenty-four miles and forty-one chains, and certifying same to be completed in accordance with the Act of Congress, approved March 3, 1869.

6. Map of definite location of the Coos Bay Wagon Road Company from Isthmus Slough on Coos Bay to a point 24 miles and 41 chains easterly, together with certificate of L. F. Grover, Governor of the State of Oregon, dated October 21, 1872, and S. F. Chadwick, Secretary of State of the State of Oregon, approving the same; also certificate of A. R. Flint, Surveyor, dated Sept. 21, 1872, and Aaron Rose, President of the Coos Bay Wagon Road Company, certifying that the road had been constructed in all respects in accordance with the Act of Congress, which certificate is dated September 22, 1872.

Whereupon the defendant called the witness, Geo. S. Gothro, who testified that he was a timber cruiser; had been in that business all over the Pacific Coast for eight or ten years; that he is familiar with the Coos Bay Wagon Road grant and the limits of the lands embraced in the grant. That he made a cruise of the lands of the Coos Bay Wagon Road grant, beginning at Roseburg and running west to the top of the mountains, and he cruised every quarter section of the Wagon Road Company's grant within those limits, taking about four months. Witness testified that he made cruise maps showing the nature of the soil, the amount of tim-

ber, the contour of the country and a general description of the nature and character of each quarter section and defendant now offers said cruise maps, being Defendant's Exhibits 15 to 52, in evidence.

As to the nature of the soil and character of the land, this witness stated:

Q. But in that cruise there was some bottom land, agricultural land, some cultivable land and some that was,—I will ask you to state what percentage of the land in that low land, as you take it, was agricultural land, or bottom land?

A. Do you mean land that could be plowed and farmed into grain?

Q. Yes.

A. There would not be 1% of the whole ground,—of the whole ground that I examined. It would be less than 1%.

Q. How much percentage of it would you say would be agricultural and fruit lands, suitable for that?

A. Oh, well I don't believe it would exceed two or three per cent fruit land.

Q. How much would be suitable for grazing land, as it stands now?

A. Oh, probably 50%—40% of it would be grazing; that is not all the year round at that, but the land east of the summit of the divide, you do not get any grazing on that in the summer—just a few months in the fall and spring.



Q. The rest of it, what would you say that was useful for?

A. I don't think it has any use at all.

It is further certified that the Government called as a witness on its behalf M. J. Kinney, who testified that he is sixty-seven years of age and has lived in Oregon all his life; that he was engaged in the salmon business and in the timber and lumber business for the last thirty-nine years. That a part of this business was in buying and selling timber land. Concerning the Coos Bay Wagon Road grant lands, this witness testified on cross-examination as follows:

Q. During the course of your business was your attention called to the land known as the Coos Bay Wagon Road grant lands?

A. Yes, sir.

Q. Extending from Roseburg to Coos Bay?

A. Yes.

Q. When was that first brought to your attention?

A. In January or February of 1902.

Q. I mean the very first time?

A. The first time that the Coos Bay property was brought to my attention was in—I will get it in a few minutes—I think it was 1870; it may have been 1872.

Q. In what way was it brought to your attention?

A. Father spoke to me about it, the Southern Oregon land grant—or as it was at that time, it was

the Coos Bay Wagon Road grant, and he thought at the price that he was offered it by Hen Owens of Roseburg it was a good buy and we considered it. I was living then in San Francisco. I had some money and had enough to pay for my part of it.

Q. At what price was it offered at that time?

A. It was offered to us at \$30,000.

Q. Was that for the entire grant?

A. There was about 100,000 acres, but I do not remember the exact amount. The entire land grant at that time. Hen Owens and old Hamilton was in it.

Q. Did you negotiate for its purchase at that price?

A. Yes, sir.

Q. How far did the negotiations proceed; state fully?

A. Well, I came from San Francisco and my father and Mr. Gray examined into the land; I was living at San Francisco and—

Q. What Mr. Gray, what is his full name?

A. I think his full name is G. W. Gray.

Q. Where did he live?

A. He lived in Salem.

Q. Is he now living?

A. No, he is not living. I think his son is living in Seattle. He has a daughter living here in Portland, and each was to take one-third, and my father and I agreed to take one-third each and Mr. Gray was to take one-third, and after having it under consideration for some time, looking into it, Mr. Gray

said that the taxes would ruin us, and on account of that we turned it down, or he turned down his third part of it.

Q. Mr. Gray declining to go into it, did you and your father further consider it?

A. No, we did not.

The witness then testified that he had an option later on a contract to purchase the property but the deal fell through and was never consummated. Further on cross-examination this witness says:

Q. At the time you bought did you have the advice of attorneys as to the title?

A. I did; I paid Mr. Greene \$2300 for his opinion.

Q. Did they advise you of this condition in the grant?

A. They did not.

Q. Providing for the sale of the land in quarter-section tracts at \$2.50 an acre?

A. They did not. They assured me the title was perfect.

It is further certified that the Government called Geo. Watkins, witness on its behalf, who testified that he lived at Marshfield, was an attorney at law; that he practiced his profession there since 1902 and was admitted to practice law in 1880; that he and Mr. Reeder presented applications to the Southern Oregon Company for the purchase of the lands of the Coos Bay Wagon Road Company; that they presented them to Mr. Shine, representing the Southern Oregon Company, and that all applica-

tions presented by him were refused. On cross-examination this witness testified as follows:

Questions by Mr. Gearin:

Q. During what period, Mr. Watkins, did you make these applications?

A. My recollection is that it began some time in the latter part of 1907 and extended over some time in 1909, that is my recollection.

Q. 1907 and extended over to 1909?

A. I think so.

Q. You came in here to Marshfield in 1902?

A. Yes, sir.

Q. Where had you been before that?

A. I was practically up at The Dalles in Oregon; I went from there to Spokane.

Q. What I mean is, were you in Coos County in—was this the time you came into Coos County or that you came to Marshfield only?

A. I came into Coos County in 1902 and into Marshfield.

Q. At the same time?

A. Yes.

Q. How did this movement begin for the making of applications for these lands?

A. There was considerable agitation about the filing on the railroad lands and many people were anxious to file on these lands with the idea that it might give them some preference, and there was nobody here at the time taking applications and so Mr. Reeder and I prepared to take applications and did take them.



Q. You caused it to be circulated around throughout the country that you would make these applications, did you?

A. Well, not especially; that is to say, we didn't do any special advertising.

Q. No, but you informed people that if they came to you that you would locate them on a particular quarter, didn't you?

A. Yes, we informed them that we would locate them.

Q. Did you have a cruise made of the timber?

A. We didn't, sir.

Q. Where did you get your cruise of the timber?

A. The cruise was made, as I understood, for Dr. Keeney of Portland or of Astoria, I believe it was.

Q. M. J. Kinney?

A. I think so.

Q. That was about the time or a little after the time that he had attempted to buy these lands from the Southern Oregon Company, wasn't it?

A. That was my understanding, Senator, that he proposed to buy the lands from the Southern Oregon and that he or someone had a cruise made. Now, the cruise as I understood it—I don't know that it is a fact, but the cruise that we had, as I understood it, was a copy of that cruise; that was my understanding.

Q. Well, I suppose that is correct. You or your partner got it somewhat, anyway?

A. Yes.

Q. And you consider it was a reliable cruise?

A. Yes, sir, it was said to be a reliable cruise.

Q. And in making these selections of quarter sections to file upon you selected the quarter sections that had the most timber on, didn't you?

A. Well, sometimes an applicant would come in himself and he would want to select a piece somewhere convenient to some property that he had or to some stream where he thought he could get the timber out or some place that was accessible, and sometimes they selected themselves—many times.

Q. But if they didn't and if in response to information conveyed to them in some way that you were prepared to act for people so situated, they came to you, then you would pick out a good quarter for them?

A. Yes, sir.

Q. Told them about it, showed them the timber that was upon it and what a good bargain it would be if they could get it for \$400 a quarter; that is the way it was done, wasn't it?

A. No, sir, not exactly that way.

Q. Well now, tell exactly how it was done. I am just guessing at the way it probably would be done.

A. I think that there was no one told it was a good bargain.

Q. Well then, we will leave my part of that description out; is the rest of it correct?

A. So far as I was concerned everyone was told that it was a chance, that it was a gamble.

Q. Taking a long shot at it?

A. Yes, we told them it was a gamble or I did, those that I talked with, and if they wanted to take the chance and pay \$21.00, very well, and if they didn't they would better let it alone.

Q. But what I mean is, that if they could get the quarter section that you suggested to them for \$400 and get a complete title to it, it would be a very good bargain, wouldn't it?

A. Indeed it would, most of it.

Q. And then they paid you the \$21.00 for your expenses and for making these applications and taking care of it for them. Now, Mr. Watkins, did they each one bring in \$400 to you?

A. No, sir.

Q. That is a fact, they didn't do that?

A. No, sir.

Q. You knew when you made the applications that they were going to be refused after you got started on it?

A. Yes, sir.

Q. So that that was a formality? They probably would be ready to give it if you asked them for it, but none of them did as a matter of fact leave the money with you?

A. No, sir.

Q. When you went to make the application did you then tender in money to Mr. Shine \$400?

A. Yes, sir.

Q. One \$400 would do for the whole bunch?

A. One \$400 answered for the whole bunch.

Q. You knew they were going to be refused when you made them and they were refused?

A. Yes, sir.

Q. That was in 1908; what did you do about that then, Mr. Watkins?

A. In what respect.

Q. Any more about it, your application was made and you went to the County Clerk and got it in this book that has been introduced here or referred to, Miscellaneous Records, and that is as far as you could go; you could not record it in the deed records?

A. No, sir.

Q. And what then did you do about it in each case?

A. We had a contract that we were to bring a suit of some sort if the United States didn't act.

Q. Didn't act?

A. But the United States did act and so we filed for some of the applicants an answer in this case—that is I suppose it was in this case—asking to intervene.

Q. Now, are these interveners up there in the Portland suit the people that you represented down here?

A. There are some of them we were to file a test case. Now, we were represented there by E. B. Dufur and H. H. Riddell, and I understood without knowing anything about it personally that the Court refused to allow them to intervene.

Q. Yes, they struck out the intervention, the



petition in intervention filed for your people by whomsoever represented up there, was stricken out by the Court as you understand it?

A. As I understand it, yes.

Q. Then did you proceed any further with them?

A. I did not; I left it in their hands to look after for us.

Q. Are your people—and when I say your people I mean the people that you represented in these applications—in any way connected with the different suits brought by Mr. Minot?

A. In no way whatever to my knowledge.

Q. You know Mr. Minot?

A. I do.

Q. And none of your people are included in the list of plaintiffs he represents, to your knowledge?

A. Not to my knowledge, no.

The witness Watkins further testified that he presented to the Southern Oregon Company, 200 or 300 applications for the purchase of tracts of land, each applicant applying for 160 acres at \$2.50 an acre, and accompanied each application with a tender of the purchase price, and that they were all rejected. Each application contained this clause:

“I hereby tender and offer you in payment therefor the full sum of two dollars and fifty cents for each and every acre therein, amounting in all to the sum of four hundred and seven dollars, and also all taxes and every public charge paid by yourself and your predecessors in trust upon this land, all in United States gold coin, and I hereby demand of you

a good and sufficient deed of conveyance conveying said premises to me."

It is further certified that the Government introduced in evidence Exhibits 69, 70, 71 and 72, being patents from the United States to the Coos Bay Wagon Road Company for the lands embraced in the grant and including the lands, title to which is involved in this suit, and it is hereby certified that each of said patents (omitting the description of lands conveyed and the date of the patent) is in words and figures as follows, to-wit:

"No. 4.

THE UNITED STATES OF AMERICA.

To All to Whome These Presents Shall Come,  
GREETING:

*Whereas*, by the Act of Congress, approved March 3, 1869, entitled 'An Act granting lands to the State of Oregon, to aid in the construction of a Military Wagon Road from the navigable waters of Coos Bay to Roseburg in the said State,' authority is given to the Coos Bay Military Wagon Road Company 'to construct a Military Wagon Road in accordance with said Act, and for this purpose, there is granted alternate sections of public lands designated by odd numbers to the extent of three sections in width on each side of said road, provided, that the grant hereby made shall not embrace any mineral lands of the United States or any lands to which homestead or pre-emption rights have attached.'

*And whereas*, by the 4th section of said Act it is further enacted, 'That the State of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands not previously reserved to the United States, nor otherwise disposed of and not exceeding six miles in distance from it, equal to the amount reserved from the operation of this Act in the first section.'

*And whereas*, it is shown by certificate on file of the Governor of said State, bearing dates December 10, 1870, September 19th, and October 2d, 1872, that said Military Wagon Road had been completed for sixty-two miles and forty-one chains in conformity with said Act.

*And whereas*, the State Legislature of Oregon, by the Act of October 22, 1870, designated the said Coos Bay Military Wagon Road Company, the beneficiary of said grant.

*And whereas*, the said Wagon Road Company has applied for a conveyance of the title by patent to the lands granted by the said Act of March 3, 1869, in conformity with the Act approved June 18, 1874.

*And whereas*, of the sections and parts of sections of land inuring to the said 'Coos Bay Military Wagon Road Company' there has been duly selected and reported to this office, in accordance with the Act and the rules and regulations of the General Land Office as shown by the original list of selec-

tions dated June 12, 1874, and March 20, 1876, by the Register and Receiver at Roseburg, Oregon.

The said tracts being described as follows, to-wit:

(Here follows description.)

NOW KNOW YE, that the United States of America in consideration of the premises and pursuant to the said Act of Congress HAVE GIVEN AND GRANTED, and by these presents DO GIVE AND GRANT unto the said Coos Bay Military Wagon Road Company as beneficiary of said grant to the State of Oregon and to its assigns the tracts of land selected as aforesaid and described in the foregoing. Yet excluding and excepting from the transfer by these presents all mineral lands should any be found to exist in the tracts described in the foregoing.

TO HAVE AND TO HOLD the said tracts, with the appurtenances unto the said 'Coos Bay Military Wagon Road Company' and to its assigns forever, with the exclusion and exception as aforesaid.

IN TESTIMONY WHEREOF, I, Ulysses S. Grant, President of the United States, have caused three letter to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington this seventeenth day of February in the year of our Lord....., and of the Inde-



pendence of the United States the.....

[Seal]

By the President, U. S. GRANT,

D. D. CONE,

Secretary.

S. W. CLARK,

Recorder of the General Land Office.

No. 2 dated March 18th, 1876—1080 acres.

No. 3 dated November 8th, 1876—61,111.53 acres.”

It is further certified that the complainant called as a witness in its behalf C. T. McKnight, who testified that he lived in Marshfield and had lived there practically all his life; that he is a lawyer, admitted to the bar in 1900; that he took part in drawing up and presenting to the Southern Oregon Company applications to purchase lands in the Coos Bay Wagon Road land grant; that at first it was intended by himself and those with whom he was associated in this matter to get together only enough people to provide sufficient funds to contest the matter in the District Court of the United States and of the State, and to have construed the original grant from the United States to the State of Oregon and from the State of Oregon to the Coos Bay Wagon Road Company; that Mr. Seabrook, a lawyer who was associated with him, had prepared a map of all the lands of the Southern Oregon Company, and that as lands were selected they were checked off of this map; that after the applications were prepared and sworn to they were delivered in person by Mr. Seabrook, or the witness, to Mr. Robert E. Shine, who was then General Secretary

of the Southern Oregon Company; that Mr. Shine refused to recognize them at all, stating that he wanted nothing to do with them and didn't want to know anything about them. The applications were left on the private desk of Mr. Shine in the Southern Oregon Co. Some months afterwards the applications were returned to witness by Robert E. Shine and by A. E. Seaman, an attorney. The approved applications amounted to 207. There was no money tendered with the applications and written tender, as shown in the application, was the only tender that was made. It was witness' understanding that if the applications had been accepted the money should be forthcoming to make the tender good. Neither Mr. Seabrook nor the witness were ever upon the lands—that is for the purpose of making selections, or examining them. Witness thinks that likely he had been over most of the lands, or some of them at least, hunting.

Witness became interested in the lands through Seabrook, who was a lawyer also. Mr. Seabrook had been examining the Act of Congress granting the lands to the State of Oregon and the Act of the Legislature with reference to it, and thought that perhaps inasmuch as the Act provided that more than \$2.50 an acre should be charged for the lands, the Southern Oregon Company could be compelled to sell the lands to whomsoever applied and offered \$2.50 an acre. The witness and Mr. Seabrook went into partnership about it and as a result of their efforts these applications testified to by witness

were made a case was instituted in the United States Court for the District of Oregon—the Nicholls case, reported in 135 Federal Reporter, page 232. Witness designated the procedure as the creation of a pool and testifies as follows:

Q. What was the original purpose when this pool was formed with respect to limiting the number that would go into it?

A. There was a limitation of the pool; I have forgotten the exact number now, it has been so long ago, but there was no intention of taking in all of these various applicants. What this pool intended to do, they intended to test this law out and if successful they were going to divide the results of the case equally or in certain proportions among themselves.

Q. Well, how, then, did you come to get in this number of applicants?

A. This number of applicants so far as I was ever able to ascertain, why, members of the pool had certain friends that they made known what we were going to do and in turn they made it known and it seemed to be a sort of contagion there, for two or three days they simply made a rush on the office there and in that way the number got to what it was.

Q. Was there much interest shown by the people, much desire to get this land?

A. Well, there seemed to be more or less of a brainstorm than anything else; the office was simply crowded, that is all.

Q. All anxious to purchase. And so far as you know those who came were the persons who had the means to purchase in the event the company was willing to sell?

A. So far as I know; I could not testify to that positively, however, although that was the understanding which both Mr. Seabrook and myself had.

Q. After the Nicholls case was decided adversely here the matter was dropped, was it?

A. Not altogether. Mr. Seabrook afterwards prepared a bill for the Legislature of this state in line with this same work that he had. The copy of the bill I never saw; it was handled exclusively by Mr. Seabrook and he can tell you the detail of the entire situation himself.

Q. I see. If, Mr. McKnight, the Southern Oregon Company had been willing to sell the lands within the terms of the grant could it have done so at the time these applications were filed?

A. What do you mean, could it have done so?

Q. Could it have sold the lands, could it have found purchasers?

A. Oh, yes, these people would have purchased this land and many others if they would have sold it.

Q. I will read into the record Exhibit 22 as being typical of the other applications filed, and I take it, Senator, we can agree that it will not be necessary to offer the other applications.

Mr. GEARIN: Not necessary; we will stipulate they are all exactly the same except the name and the description of the property.



Mr. SMYTH (reading Exhibit 22): "Southern Oregon Company, Empire City, Oregon. Gentlemen, I, the undersigned, am a citizen of the United States and of the State of Oregon and am over the age of 21 years, and hereby make application to you to purchase from you the following described real property situate in the County of Coos and the State of Oregon, to-wit: The Southwest Quarter (SW $\frac{1}{4}$ ) of Section Thirty-one (31) in Township Twenty-six (26) South, Range Twelve (12) West of Willamette Meridian, including Lots 3 and 4 of said section and containing 162.43 acres, the same being a quarter section of land and being a portion of the lands granted in trust to the Southern Oregon Company in aid of the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg in the State of Oregon, by the United States by an Act approved March 3, 1869.

"I hereby tender and offer you in payment therefor the full sum of Two Dollars and Fifty Cents for each and every acre therein, amounting in all to the sum of Four Hundred and Seven Dollars, and also all taxes and other public charges paid by yourself and your predecessors in trust upon this land, all in United States gold coin; and I hereby demand of you a good and sufficient deed of conveyance conveying the said premises to me.

"I claim the right to purchase the said tract of land at the price above tendered under and by virtue of said Act of Congress entitled 'An Act granting lands to the State of Oregon to aid in the construc-

tion of a Military Wagon Road from the navigable waters of Coos Bay to Roseburg, in said State,' and which Act was approved March 3, 1869.

“NELS RASMUSSEN.

“State of Oregon, County of Coos. I, Nels Rasmussen, being first duly sworn, depose and say that I am the applicant who signed the foregoing application to purchase certain lands therein described, and that the said application and the facts stated therein are true as I verily believe.

“NELS RASMUSSEN.

“Subscribed and sworn to before me this 16th day of February, 1904.

“E. B. SEABROOK,  
“Notary Public for Oregon.”

Q. When you got together and agreed to make these application to the Southern Oregon Company you had no intention to include any but the few you called a pool?

A. They originally, I think, were between 20 and 25 in it; I would not say positively.

Q. But had you people gone out and selected the particular quarter sections you wanted?

A. No, except the map itself.

Q. You knew nothing about the relative values of it?

A. We knew what the cruise was and the description from the map was all, never been on the land itself.

Q. It was timber land you took—that original pool?

A. Yes, the original pool selected what they considered the best of the timber lands, that is, taking into consideration the accessibility and everything in connection with it. However, I will say that there were a number of applications that were made by the farmers residing in that district that were not timber lands, but they were not with the original pool.

Q. They took it afterwards?

A. Yes, they came into the office voluntarily themselves.

Q. And you didn't get the forms printed for that original bunch, did you?

A. No, the original bunch, if I remember correctly, Senator, were made with a dictagraph, I am not sure about that.

Q. And then when they came tumbling in so fast you thought you would print them?

A. Seabrook had those printed.

Q. And did you refuse anybody?

A. No, there was nobody refused, but it was explained to all of them exactly what we were trying to do, that is all.

Q. Each one paid how much?

A. \$15.00.

Q. And the agreement was that you should try that out in some way that seemed to you to be best calculated to effect the result and if you lost, that the \$15.00 was gone. You hadn't to pay that back?

A. No.

Q. If you won, each one of these applicants

would be entitled to go to the Southern Oregon Company and get the particular quarter section that he had designated as being the one he wanted?

A. That was the understanding.

Q. That was the understanding?

A. Yes.

Q. And then selections were made with reference to the timber only?

A. Yes, what I speak of as the pool.

Q. That is ten years ago, but your memory is good and you can recall now what you estimated the quarter sections worth that you applied for, say, the original pool?

A. You say that I would estimate the amount of timber that was on it?

Q. I mean, what do you say now was the value of each quarter section selected by the members of that original pool?

A. Well, I would not say as to what the value of it was, Senator Gearin, but I would say this, that the value of the land was greatly in excess of the amount that was offered.

Q. And now can't you recall substantially what the quarter sections were worth—you took a quarter section, didn't you?

A. Yes, I have really forgotten what the quarter section was.

Q. But you have in mind now, have you, what you thought it was worth in the market at that time, that is what I am trying to get at, just generally?

A. No, I would not say that I did as to that



have in view exactly what that was worth at the time. That pool, if I remember correctly—I am not positive as to this—was selected as nearly as possible in a body.

Q. That land was?

A. That land was; that is, if I remember correctly about that; I would not say positively, Senator Gearin, as to that, but if I remember correctly that pool—that is, the land composing the pool—was selected as nearly as possible in one tract.

Q. That would make it more valuable as a timber proposition?

A. That was one of the purposes, to place as much value on it as possible.

Q. Well, then nothing ever came of it?

A. No, the Nicholls case was tried out in the United States Court.

Q. And you never appealed it?

A. It was never appealed.

Q. And this proceeding was had in the Legislature and nothing came of that?

A. That was killed.

Q. And so the thing remained?

A. Just in the present condition as it is now.

Q. You knew when you presented all these two two or three hundred applications they would not be received?

A. I was satisfied they would be rejected.

Q. That is the reason you didn't go through the form of lugging up \$400 in gold every time?

A. Yes, sir.

Q. You knew they would not take it?

A. Certainly I knew they would not take it. Anybody would know that that knew anything about the conditions.

Q. Where did you get the cruise of that timber, I would like to know something about that?

A. I do not know where Mr. Seabrook got that cruise; that was secured by Mr. Seabrook himself, but it was from one of the cruises in this country, I would not say whose; I could not say positively as to that. I think Mr. Seabrook can probably tell you.

Q. You had no connection with getting it?

A. No, really Mr. Seabrook handled the detail of the whole situation.

Q. But it purported to be a complete cruise, did it, whatever it was?

A. Yes, I think so.

The witness further testified that all the applicants whom he represented were, as he understood it, ready to purchase if the company had been willing to sell.

Whereupon defendant introduced in evidence Defendant's Exhibit 203, letter from S. F. Chadwick to Elijah Smith, President of the O. S. I. Co., dated July 3, 1885, which is in words and figures as follows:

“Elijah Smith, Esq.,

Prest. of O. S. I. Co.

Dear Sir :

The services rendered to the O. S. I. Company by me were rendered at the request of Capt. W. H. Besse, then President of that company. They began in September, 1883, and continued until the business was complete—running through some four or five months. At the instance of Capt. Besse I went from Portland to Roseburg, negotiated for the purchase of the Coos Bay Wagon Road Company lands, succeeded, drew the bond on the arrival of Capt. Besse, and then made an abstract of sale from the county records to prevent conflict in titles. Thence I went to Coos Bay and from the records there made an abstract of all sales of that grant by whomsoever made, running back for several years. Made some deeds to right of way and transacted in detail all the business of the company in reference to these lands and other matters. It required great care in preparing lists for the deed, which was correct and the only one that was correct. In all this I made several trips to Roseburg and Portland. I also settled all matters with Crocker in the U. S. Courts involving the purchase from him, and abstracted all of the sales made from his purchase. This service not only took the time mentioned, but it was expensive, which expense I bore myself with the exception that Capt. Besse paid for a dinner and perhaps a night. Though the latter might have been paid for by a party employed by your company to

examine the timber. At all events I paid my own expenses far and near with the exception made. There is no dispute about the service. I have Capt. Besse's approval of that. After this service was all rendered I expected to hear from Capt. Besse. When he came to Portland last winter I saw him and he then told me to write him when he returned and he would fix matters there at once. I did so and sent him a letter from Judge Watson, U. S. D. Attorney, who knew something of my work, but not all of it, a copy of which I here enclose. To this letter Capt. Besse replied that you would be out here and settle this matter up, &c. Hence I called upon you. I have not given the details of the work in full, but enough to make my request clear. I know it is the most reasonable and cheapest service your company has had involving the time, labor and expense that this has, &c.

I remain yours very truly,

S. F. CHADWICK."

Whereupon defendant offered in evidence Defendant's Exhibit 205, letter from C. A. Dolph to Elijah Smith, dated June 10, 1887, in words and figures as follows:

(Letterhead of Dolph, Bellinger, Mallory & Simon.)

"Portland, Oregon, June 10, 1887.

Elijah Smith, Esq.,

Box 3107, Boston, Mass.

Dear Sir:

Referring to yours of the 2nd inst., regarding the the sale of the property of the Oregon Southern



Improvement Company, on foreclosure proceedings, I beg to say, upon the sale being made, the Master will make a report of his proceedings to the Court, and will, if the trustees become the purchasers, file their receipt for the amount bid. The bondholders will then have to pay the amount of the cost of the foreclosure proceedings in money; this is the only money that will have to be advanced in the transaction if the trustees become the purchasers at the sale.

I infer from your letter that it is your purpose to have all the bonds outstanding, canceled by the application thereto of the property of the company. If this be your intention, I would suggest that the trustees for the bondholders pay the face of the outstanding bonds for their property, and instruct me to receipt to the Master in their name for the amount bid, then let the holders of the bonds present their bonds to the trustees for cancellation, and receipt to the trustees for their proportion of the amount bid for the property. I have arranged with the Master so that his compensation will not be in proportion to the amount bid, therefore the amount bid for the property will not increase the expenses of the foreclosure.

I make these suggestions because I am unadvised as to whether or not there may not be some person, lien-holder, stockholder or otherwise, who could either redeem or compel a redemption after the sale. Of course, if there is any reason why the property should be bid off at as low a figure as

possible, these suggestions may not be worthy of consideration, but it occurs to me now that if, as I say, the intention is to cancel all the outstanding bonds, it could be more easily accomplished by making the purchase price of the property equal in amount to the par value of the bonds.

In my judgment, the person who bids off the property for the trustees should be someone having no connection with the Oregon Southern Improvement Company.

Yours truly,

C. A. DOLPH."

Whereupon defendant introduced in evidence Defendant's Exhibit 209, being letter from Hazard & Wilson, attorneys, to John L. Howard, in words and figures as follows:

(Letterhead of Hazard & Wilson, Empire City, Ore.)

"August 12th, 1886.

John L. Howard, Esq.,

48 Market St.,

San Francisco, California.

Dear Sir:

Herewith we send you copy of letter received by us from the Commissioner of the General Land Office in reply to one to the said Commissioner from us, a copy of which we enclose to you with our letter of the 19th June last. We think this letter may be accepted as conclusive, and, in fact, it is as favorable to the Company as we could reasonably expect. Mr. Loggie has visited the Moore and Crow claims,

and has ascertained that no one has been in actual possession of either of the said claims for several years past. This being the case, the Company has, undoubtedly, the legal title to these two pieces, and also, from all appearances, the superior equities, and should anyone ever attempt to take possession of either of the said pieces under the patents of Moore or Crow, the Company can then take the necessary steps to oust them and cancel the said patents; for these reasons, Mr. Loggie coincides with us in thinking it best to let the title to said two pieces remain as it is for the present.

As to the claims of Burens and Blake, the Company has nothing but the bare legal title to the land embraced therein, and this would be transferred to the equitable owners at any time they saw fit to bring suit therefor. We, therefore, recommend that the Company release the last mentioned pieces to the United States, as requested by the Commissioner, and try to obtain a return of the purchase price from Crocker. With a view to the latter, we enclose bill and statement for presentation to Mr. Crocker. If you think the statement insufficient, please advise us, and we will make it fuller.

You will observe that the Commissioner has accepted the position taken by us regarding all the other tracts mentioned in his letter, and we do not apprehend that the Company will have any further trouble with its title to the same.

We have now done about all we can to remedy defective titles to the Company's lands, outside of

town property, and will at once proceed to complete tract book as far as possible and then turn the same over to Mr. Loggie.

Very truly yours,

HAZARD & WILSON."

Whereupon defendant introduced in evidence Defendant's Exhibit 210, letter from W. A. J. Sparks, Commissioner of the Land Office, to Hazard & Wilson, attorneys, Empire City, Oregon, being in words and figures as follows:

"1886—44023

" 70365

DEPARTMENT OF THE INTERIOR  
GENERAL LAND OFFICE,  
Washington, D. C.

July 28, 1886.

Messrs. Hazard & Wilson,  
Empire City, Oregon.  
Gentlemen:

In reply to your letter of the 19th ult., you are advised that the cash entry of Dan W. Moore, Certf. 4196, and the homestead entry of Henry G. Crow, final certificate 824, covering the S $\frac{1}{2}$  SE $\frac{1}{4}$  Sec. 13, Town. 27 S., range 12 W., and the NW $\frac{1}{4}$  NW $\frac{1}{4}$  Sec. 7, Town. 28 S., range 7 W., Oregon, respectively, were patented under the rulings at the time in force in this Department, and this office must decline to call upon them, to relinquish their claims. As you were advised by office letter of May 28th, last, no action has been taken on the swamp selection of



Lots 6 and 7, Sec. 23, Town. 26 S., range 12 W., and as the tracts have been patented under the grant for the Coos Bay Wagon Road the jurisdiction of this Department over them has ceased.

The  $N\frac{1}{2}$   $NE\frac{1}{4}$ ,  $N\frac{1}{2}$   $NW\frac{1}{4}$ ,  $SE\frac{1}{4}$   $NW\frac{1}{4}$  and  $SW\frac{1}{4}$   $NE\frac{1}{4}$ , Sec. 29, Town. 25 S., range 12 W., and Lots 5 and 6, Sec. 5, Town. 26 S., range 12 W., were not restored to the public domain by office letter of May 21, 1884. It was discovered that these tracts were outside the limits of the wagon road grant, and by letter of May 21, 1884, the local officers were directed to call upon the company to reconvey them to the United States. As they were patented for said company February 12, 1875, they cannot be restored to the public, until they are either voluntarily reconveyed, or the patent has been set aside by competent authority. The local officers have been instructed not to allow any entries of these lands in their present status.

As regards the tracts covered by the entries of Peter Bureno, and Irvin Blake, covering, respectively, the  $SW\frac{1}{4}$   $SW\frac{1}{4}$  Sec. 1, Town. 26 S., range 12 W., and the  $NE\frac{1}{4}$   $NE\frac{1}{4}$  Sec. 9, Town. 28 S., range 7 W., you are advised that in Bureno's case the land is within the indemnity limits of the wagon road grant, and his claim is superior to that of the company. The office cannot, therefore, allow indemnity for the tract entered by him.

As the tract entered by Blake is within the granted limits, the company is entitled to any indemnity under its grant, will be entitled to indem-

nity therefor in the event of its reconveyance to the U. S., as Blake's claim is the stronger.

I have again to request the reconveyance of said tracts to the end that the institution of suit to recover them may be avoided:

Very respectfully,

WM. A. J. SPARKS,  
Commissioner."

Whereupon defendant introduced in evidence Defendant's Exhibit 211, being letter from Hazard & Wilson to John L. Howard, dated June 19, 1886, in words and figures as follows:

(Letterhead of Hazard & Wilson, Empire City, Ore.)

"June 19th, 1886.

John L. Howard, Esq.,

48 Market St., San Francisco, Cal.

Dear Sir:

Enclosed we send you copy of letter received by us from the Asst. Commissioner of the General Land Office regarding the tracts of land referred to in our letter to you of April 5th last. Taking these pieces in the order in which they are treated in the said Commissioner's letter, we will say:

1. We shall again write the Commissioner to ascertain, if possible, how it happened that S.  $\frac{1}{2}$  of S.E.  $\frac{1}{4}$  of Sec. 13-27-12, and N.W.  $\frac{1}{4}$  of N.W.  $\frac{1}{4}$  of Sec. 7-28-7, were patented to Moore and Crow respectively, under the Act of April 21st, 1876, when, long prior to the passage of that Act, they had been patented to the Coos Bay Wagon Road Company,

and had passed into the hands of an innocent purchaser. In the meantime we would suggest that Mr. Loggie be instructed to ascertain how long Moore and Crow have been in *actual* possession of said lands, as, unless they have been in possession over ten years, we think there is no doubt they can be ousted.

2. We shall suggest to the Department that is beyond the power of the Government to grant to the State, as swamp lands or otherwise, land that has already been patented by the United States, and sold and conveyed by the patentee to an innocent purchaser; and that such a grant would only lead to needless litigation between the different grantees.

3. We shall suggest to the Department that the Commissioner had no power to restore to market land that had long since passed from the patentee of the United States to an innocent purchaser (the Supreme Court of the United States has held that it cannot be done in the case of the original patentee except through the court), and request that 'Office letter of May 21st, 1884' be canceled, as otherwise it is certain to lead to litigation in the future between claimants under the patent and possible settlers.

4 and 5. The title of Peter Burens to S.W.  $\frac{1}{4}$  of S.W.  $\frac{1}{4}$  of Sec. 1-26-12, appears to have been superior to that of the C. B. W. R. Co., as also that of Irvin Blake to N.E.  $\frac{1}{4}$  of N.E.  $\frac{1}{4}$  of Sec. 9-28-7, and therefore Crocker had no title whatever to either of these pieces at the time in the case of his

conveyance to Besse, and all the relief the O. S. I. Co. can obtain in the case of these two pieces is a return of the purchase price from Crocker. That Crocker is liable to the company for the purchase price there can be no doubt, the point having been decided by the Supreme Court of the United States, notably in the case of *Allen v. Hammond*, reported in 11 Peters, 63.

Very truly yours,

HAZARD & WILSON.

P. S.—Regarding the two pieces last mentioned in the foregoing letter, we will further say that the *bare legal* title was in the C. B. W. R. Co. and is now in the O. S. I. Co.; but this bare legal title was worthless, for the reason that Burens and Blake both had (if the statements in the Commissioner's letter are correct) perfect equitable defenses to any suit which might have been brought by either company to recover possession. It is just possible that the Government, on a release to it by the O. S. I. Co. of this legal title, might allow the said company to select other land in lieu thereof, and we will suggest such a course in our letter to the Commissioner.

HAZARD & WILSON.

We enclose press copy of our letter to Commissioner. H. & W."

Whereupon defendant introduced in evidence Defendant's Exhibit 212, the same being communication enclosed in the letter of Hazard & Wilson to John L. Howard (Defendant's Exhibit 211), which letter is in words and figures as follows:



“DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,

Washington, D. C., May 28, 1886.

Messrs. Hazard & Wilson,

Empire City, Oregon.

Gentlemen:

In reply to your letter of the 8th ult., you are advised as follows: The cash entry of Dan W. Moore, certificate 4196, and the homestead entry of Henry G. Crow, final certificate 824, covering the S.  $\frac{1}{2}$  S.E.  $\frac{1}{4}$ , Sec. 13-27-12, and the N.W.  $\frac{1}{4}$  N.W.  $\frac{1}{4}$ , Sec. 7-28-7, Oregon, respectively, were patented under the Act of April 21, 1876, notwithstanding the prior approval of said tracts for the Coos Bay Wagon Road Company.

Lots 6 and 7, Sec. 23-26-13, and Lot 8, Sec. 5-26-12, have been selected as swamp, but no action has been taken on the swamp claim.

The N.  $\frac{1}{2}$  N.E.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  N.W.  $\frac{1}{4}$ , S.E.  $\frac{1}{4}$  N.W.  $\frac{1}{4}$ , and S.W.  $\frac{1}{4}$  N.E.  $\frac{1}{4}$ , Sec. 29-25-12, and Lots 5 and 6, Sec. 5-26-12, were restored to market by Office letter of May 21, 1884, for the reason that it was discovered that they were outside the limits of the grant for said company.

The pre-emption cash entry of Peter Burens covers, in addition to the S.W.  $\frac{1}{4}$  S.W.  $\frac{1}{4}$ , Sec. 1, the S.  $\frac{1}{2}$  S.E.  $\frac{1}{4}$  and N.E.  $\frac{1}{4}$  S.E.  $\frac{1}{4}$ , Sec. 2-26-12, and the records of this Office show that Burens filed for the lands embraced therein February 5, 1873, alleging settlement February 10, 1871, prior to the withdrawal for the wagon road company,

which was dated March 31, 1871. The company has been called upon to relinquish its claim, but no reply has been made.

In the case of Irwin Blake, the records show that one J. B. Master filed pre-emption declaratory statement for the N.  $\frac{1}{2}$  N.E.  $\frac{1}{2}$ , Sec. 9-28-7, November 26, 1857. Blake filed therefore November 20, 1870, alleging settlement same day, and made homestead entry of the tract on January 1, 1879. Blake made final proof June 12, 1884, but no action has been taken in his case. His claim you will observe antedated the order of withdrawal for the wagon road company.

All the lands mentioned are situated within the Roseburg land district, Oregon, and as you are aware have been approved for said company.

Very respectfully,

S. M. STOCKSLAYER,

Asst. Commissioner."

Whereupon defendant introduced Defendant's Exhibit 213, being letter from Hazard & Wilson, attorneys, to John L. Howard, dated August 5, 1886, in words and figures as follows:

(Letterhead of Hazard & Wilson, Empire City, Ore.)

"August 5, 1886.

John L. Howard, Esq.,

48 Market St., San Francisco, Cal.

Dear Sir:

In accordance with your request, we send you the following statement of matters requiring adjustment with the Coos Bay Wagon Road Company:

1. The N.W.  $\frac{1}{4}$  of S.W.  $\frac{1}{4}$  of Sec. 25-27-12 was included in warranty deed from C. B. W. R. Co. to W. H. Besse, but was never patented to, or owned by, the said company. The C. B. W. R. Co. should refund to the O. S. I. Co., as the grantee of the said Besse, the actual value of this piece of land, estimated by Mr. Loggie at about \$2500.

2. Lots 3 and 4 of Sec. 7-28-7 were erroneously patented by the United States to the C. B. W. R. Co. instead of Lots 3 and 4 of Sec. 27, in the said township, there really being no such lots in the said Sec. 7. In deed from C. B. W. R. Co. to John Miller, the mesne conveyance to the O. S. I. Co., the lots are correctly described as in Sec. 27. The department at Washington has signified its willingness, on the release by said C. B. W. R. Co. to the United States of Lots 3 and 4 of said Sec. 7, to issue a new patent for said Lots 3 and 4 of said Section 27. The C. B. W. R. Co. should, therefore, be requested to execute such release, secure the corrected patent, and then give the O. S. I. Co. a quit-claim deed for the said lots.

3. Sections 7, 19, and 31 of T. 28 S. R. 10 W. are usually large sections, each having a row of lots numbered 1, 2, 3 and 4 and containing about 140 acres, on the west side of the section in addition to the ordinary full section of 640 acres. The patent from the United States to the C. B. W. R. Co. conveys all of the said sections, but the deed from the said company to W. H. Beese only calls for Lots 1, 2, 3 and 4, E.  $\frac{1}{2}$  of W.  $\frac{1}{2}$  and E.  $\frac{1}{2}$  of the said sec-

tions, thus leaving a strip between the lots and E.  $\frac{1}{2}$  of W.  $\frac{1}{2}$  of each of said sections unconveyed. A new deed, covering the whole of these sections, should be obtained from the C. B. W. R. Co.

We understood you to say that you would present these matters to the C. B. W. R. Co. through Mr. J. M. Fox, of Portland, Oregon. Hon. J. F. Watson, attorney at law, of Portland, and late secretary of the said company, can inform Mr. Fox who are the company's present officers.

Very truly yours,

HAZARD & WILSON."

Whereupon defendant read into the record from original letter book of the Southern Oregon Company, letter from Elijah Smith to Geo. W. Loggie, of date July 1, 1887, in words and figures as follows:

"Boston, July 1st, 1887.

Geo. W. Loggie, Esq.,

Empire City, Oregon.

Dear Sir:

Mr. Howard asks me by telegram if we have given you any instructions about subscribing for the stock of the new company (Southern Oregon Company). I think we have not.

On looking over the articles of incorporation, I see that the incorporators are Geo. W. Loggie, S. H. Hazard, and James Webster and that you are designated to receive subscriptions. The trustees of the old company's mortgage Rotch and Mandell have telegraphed to Mr. Dolph to give such receipt



to the master as may be necessary and to have the deed of the whole property made out in the name of Prosper W. Smith, individually. The property will then be free for disposal or sale to the new com. and will be sold to it for the amount of the capital stock (\$1,500,000) or for so much of the stock as may be left after the 7 directors have subscribed for just enough to make them eligible.

You may subscribe for the Eastern directors, Elijah Smith of New York, William W. Crapo of New Bedford and Charles W. Plummer of New Bedford; the Oregon directors can subscribe for themselves; you understand the directors' subscriptions are to be for just enough to make them eligible. The directors can then authorize the issue of the balance of the stock to P. W. Smith in payment for the property which he will deed to the company.

Mr. Hazard can probably arrange the details of this matter for you.

As Mr. Webster has left, you can put on Mr. Hall, who takes Webster's place with the understanding that he will resign at any time when requested to.

The stock which P. W. Smith receives he will distribute pro rata to the old bondholders.

I will have certificates made and issued from here.

Yours truly,

G

ELIJAH SMITH."

Whereupon defendant read into the record, from the original record book of the Southern Oregon

Company, letter from Elijah Smith to C. A. Dolph, dated July 1, 1887, in words and figures as follows:

“Boston, July 1st, 1887.

C. A. Dolph, Esq.,

Portland, Oregon.

Dear Sir:

I answered your telegram in regard to your giving the master a receipt in the name of the Oregon Southern Imp't Co. trustees, Rotch and Mandell, and added that the deed should be made in the name of Prosper W. Smith, individually.

I telegraphed in the trustees' names. If you need any authority, with their signatures attached, send me such form as you want and I get it attended to.

The idea of deeding the property to P. W. Smith is that he can sell it to the new company and receive in consideration for it the whole amount of the capital stock, say \$1,500,000 of stock of the Southern Oregon Company, or so much of it as will be left after the new directors have subscribed for one share each or for whatever is necessary for them to qualify; there are 7 directors provided for the new company.

We thought it would be better to have the property deed first to P. W. Smith and then from him to the new company than to have it deeded direct from the master to the new company.

By P. W. Smith's selling the property for the new stock, he gets full paid stock which he will distribute to the people who have sent their bonds to

the committee. The few outstanding bonds will undoubtedly all come in.

You will instruct us what is to be done with the bonds.

Yours truly,

ELIJAH SMITH.

By P. W. S."

Whereupon defendant read into the record, from book identified by A. B. Armstrong as original letter press book of the Oregon Southern Improvement Co. list of stockholders of the Oregon Southern Improvement Co. on June 12, 1884, which list is as follows:

LIST OF STOCKHOLDERS OF  
THE OREGON SOUTHERN IMPROVEMENT  
COMPANY.

Names.	Shares.
William J. Roth .....	380
L. A. Plummer.....	380
Edward D. Mandell.....	300
William H. Besse.....	290
Alexander H. Seabury.....	280
George S. Homer.....	280
William W. Crapo.....	280
J. N. Knowles.....	250
Isaac M. Merrill.....	250
William Lewis .....	150
Cyrus Lothrop .....	150
Charles Davenport .....	100
Edward D. Maynard.....	100
H. M. Knowles.....	100

Names.	Shares.
Thomas B. Griffith.....	100
Goss, Sawyer & Company.....	1,100
Susannah K. Tobey.....	80
Oakes A. Ames.....	60
William Rotch .....	50
Samuel H. Cook.....	50
Sarah E. Seabury.....	50
Caroline O. Seabury.....	50
John P. Knowles.....	50
Alden Beese .....	50
Ella J. Boggs.....	50
M. F. Pickering.....	50
Charles E. Moody.....	50
Thomas A. Westcott.....	50
C. W. Cochrane.....	50
John Patten .....	50
John O. Patten.....	50
J. L. H. Cobb.....	50
J. & W. R. Wing.....	30
Edward W. Seabury.....	30
Peleg Blankinship .....	30
S. D. Bailey.....	30
Albert C. Page.....	30
J. E. Hadley.....	30
Stephen P. Bray.....	30
Stephen P. Bray, Jr.....	20
George L. Bray.....	20
S. D. Hadley.....	20
Timothy F. Clary.....	20
Barnabas Holmes .....	20



# 360 *United States vs. Southern Oregon Company*

Names.	Shares.
H. Barney .....	20
Alfred Doane .....	20
Samuel C. Hart .....	10
Mary B. Seabury.....	10
Helen H. Seabury.....	10
Charles W. Griffith.....	10
W. W. Hardy.....	10
Fanny G. Bray .....	10
E. Crowell, Jr.....	10
J. D. Robinson.....	10
William P. Granger.....	1
G. H. Miner.....	1
Gorham B. Knowles.....	1
Frederick Schetter .....	1
Elijah Smith .....	1
William Rotch, Trustee.....	14,235

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Total number of shares issued.....20,000

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Boston, Mass., June 12, 1884.

I hereby certify that the above is a correct list of the stockholders of The Oregon Southern Improvement Co., as of record from May 26, 1884, when the transfer books were closed, to June 26, 1884, the date of the annual meeting.

Attest:

WM. ROTH, Ass't Sec'y.

Whereupon defendant read into the record, from said letter press copy book of the Oregon Southern Improvement Company, statement purporting to

be statement of payments for Coos Bay Wagon Road lands, in words and figures as follows:

**"STATEMENTS OF PAYMENTS FOR COOS BAY AND ROSEBURG WAGON ROAD LAND.**

By Messrs. Wm. H. Beese, Wm. J. Rotch, Wm. W. Crapo, L. A. Plummer, Alexander H. Seabury and Geo. S. Homer.

---

Jan. 17, 1884, cash on a/c.....\$60,000.00

Int. on same to July 1, '84, @  $7\frac{1}{2}\%$

(being coupon interest @ 6% on bonds to be recd. in settlement @

80%) ..... 2,050.00

Feb. 14, 1884, cash on a/c..... 30,000.00

Int. on same to July 1, '84, @  $7\frac{1}{2}\%$ ... 856.25

---

Total amount due from O. S. I. Co.,

July 1, '84.....\$92,906.25

\$108,000 bonds and 1080 shares

stock @ 80%, del'd.....\$86,400

108 coupons on bonds, due July

1, '84, @ \$30..... 3,240— 89,640.00

---

Bal. due from O. S. I. Co.....\$ 3,266.25

\$12,000 addl. bonds (and 120 shares stock)

subscribed for @ 80%..... 9,600.00

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Bal. due from the six subscribers.....\$ 6,333.75

Bal. due from each six subscribers.... 1,055.63

Whereupon defendant read into the records, from said letter press copy book of the Oregon

Southern Improvement Company, letter of date May 24, 1887, to Barnabas Holmes from P. W. Smith, in words and figures as follows:

“Boston, May 24th, 1887.

Barnabas Holmes, Esq.,

Elizabeth, N. J.

Dear Sir:

I have yours of the 16th inst. with enquiries about the Southern Oregon Improvement Company's affairs. No regular statements have been issued to the stockholders; we have been ready, however, to give such information as has been requested. The company has never got into working condition, but has been in trouble during most of its existence and it has not seemed of any consequence whether statements were issued or not; a few of the large bondholders have ‘lugged’ the concern along to keep it from going to ruin until it has become necessary to reorganize it. I enclose a copy of the plan for foreclosure and reorganization; the decree for foreclosure has been obtained and the sale will take place at Empire City, Oregon, June 23rd next.

\$1,227,000 of first mortgage bonds have been issued by the company and \$2,000,000 of stock. The stock will be wiped out of existence by the foreclosure.

\$716,000 of the bonds were sold for money or property at 80 cents on the dollar; \$155,000 of bonds were sold at 50 for money, \$46,000 of bonds were sold at 33 1-3 for money and \$310,000 of bonds were sold at 25 for money.

The stock was issued with the first lot of bonds as part of the consideration for the property; although \$2,000,000 of stock was authorized to be issued there was really only \$713,000 of stock distributed.

The property consists of about 105,000 acres of land; one steamship; a saw mill, wharf, booms, store, dwelling house and one or two small buildings; the cost of these has absorbed the proceeds of the stock and bonds issued.

The company has no lumber on hand. No interest has been paid on the bonds since July, 1884; aside from the overdue interest, the reorganization plan shows the liabilities.

Yours truly,

P. W. SMITH, Agt."

Whereupon defendant called the witness, Herbert Armstrong, who testified that he was vice president and general manager of the Southern Oregon Co.; that he employed Geo. S. Gothro to make cruises of the property of the Southern Oregon Co. and that Gothro did so and furnished to the witness a report of such cruises, which report consisted of thirty-seven sheets, identified by witness as Exhibits 15 to 52, which were thereupon introduced in evidence. The witness examined defendant's Exhibits 56 to 176, being certain blue prints produced by T. J. Thrift and testified that these were blue prints which Mr. Thrift had given to him; that they were the copies of the official cruise of the county, made under contract with Mr.



Dennis McCarthy. Whereupon defendant introduced in evidence said Exhibits 56 to 176. Witness further testified that in his capacity as vice president and general manager he had charge of the books and papers of the Southern Oregon Company and the Oregon Southern Improvement Co. Witness identified book marked "Private Letter Book," purporting to contain letters from October 14, 1884, to August 7, 1887, to and from different officers and agents of the Oregon Southern Improvement Co. and the attorneys of that company and says that this book came into his possession as such officer of the Southern Oregon Company as a part of the records of the Southern Oregon Co. and the Oregon Southern Improvement Co. and always had been considered and treated as what it purports to be—one of the original books kept by the Oregon Southern Improvement Co.

Whereupon defendant read into the records from said book Defendant's Exhibit 195, being a letter from J. P. Metcalf, general manager, to Elijah Smith, president of the Oregon Southern Improvement Co., dated April 30, 1885, in words and figures as follows:

Whereupon defendant introduced in evidence Defendant's Exhibit 195, being letter from W. P. Metcalf, general manager, to Elijah Smith, president Oregon Southern Improvement Company, dated April 14th, —5, being in words and figures as follows:

“April 30th, —5.

Elijah Smith, Esq.,  
President O. S. I. Co.,  
Boston, Mass.

Dear Sir:

I have yours of the 21st about the 1300 acres of land yet to be patented to the Wagon Road Co. I found Dr. Hamilton of the W. R. Co. has the same idea, that we are to have the lands when patented, but there is no certainty of patents ever being issued unless we examine the lands and decide whether we want them and then push for the patents.

Mr. Howard saw the desirability of having an examination and appraisement of our lands made and details kept in the office to enable us to name a price on any parcel applied for without sending specially to examine on each application. I do not know whether he has said anything about it to you. It should be done and the 1300 acres included. Then we can decide about taking them. They are listed at the Land Office for patent. The pieces are scattered as our own property is, and only a thorough examination, which would have to be confided to the proper person or persons would decide the question of their desirability to the company.

Unless they are found to be especially desirable I would not advise taking them. We have more timber land than we can develop in twenty years or more with what contiguous property we shall control by controlling the transportation and unless these parcels contain bottoms that are available for

agricultural settlement and could be readily sold, I do not see what we want of them. We have already too much barren and burnt hill land, inaccessible and valueless according to present light, to acquire more to pay interest and taxes on.

I know of 80 or 160 acres out of the 1300 that I could sell for cash, but whether there is any more or not would have to be found out.

Yours truly,

W. P. METCALF,

Gen. Mgr."

Whereupon the witness identified original letter of W. H. Beese to Wm. Rotch, treasurer, dated September 27, 1883, which defendant thereupon offered in evidence, being Defendant's Exhibit 198 and is in words and figures as follows:

"San Francisco, Sept. 27th, 1883.

Wm. Rotch, Esq., Treasurer,

Dear Sir:

I have neglected to write you since my arrival in this place—have been waiting for something definite.

On my arrival here, I found that parties here had bought the Newport mines a few days previous and paid \$32,000 more than the mines were offered to us for. I have spent about three weeks in Southern Oregon. We have found good coal on our land within three miles of Empire City; think it fully equal to the Newport coal. Mr. Foster of Flint, Mich., has made a splendid report on our timber

land. He makes the average yield of lumber per acre much larger than I did in my report. Shall bring his report with me. I have purchased a large tract of first-class timber land, about 94,000 acres. It lies adjoining the headwaters of Coos Bay, and easterly towards Roseburg. All first-class land, and the timber can be transported easily to Coos Bay, three-quarters of it by natural rivers and remainder by R. R. or flumes. Some of the land near Roseburg is good farming land, worth \$20 per acre, and all the land is rich soil, and will make good farms after the timber is cleared. I give about one dollar seventy-five cents per acre, \$1.75—perhaps a little more or less, according to expenses. Gave for a part of it \$1.50 and a part \$1.75. Think the expenses will make it average \$1.75—the title is good 2nd from the government.

Please inform your father, and tell him I will explain to him all my plans on my return, which will be in course of two weeks.

Yours very truly,

W. H. BESSE."

Whereupon defendant identified original letter from S. F. Chadwick to Wm. Rotch, treasurer, dated April 10, 1884, which defendant thereupon introduced in evidence as Defendant's Exhibit 200, in words and figures as follows, to-wit:



"Salem, Oregon, April 10, 1884.

William Rotch, Esq.,

Secy. of O. S. I. Co.,

Dear Sir:

Mr. Friedlander, sec. of the O. S. R. & T. Co., writes that my share of stock in that company should be sent to you. I received one share and receipted for it. I had it at our meeting at Roseburg and supposed I could put my hand upon it at any moment. But I find I cannot do it. It must be among my papers somewhere and while I have looked for it I have not been able to find it. I regret this, as I have never in all my practice at home and abroad for a quarter of century lost a paper of any description. If this should prove to be a loss I will make proof of it. If found I will forward it to you.

I am very glad to know that there is hope of the payment of the \$5000 to our company. We have done a great deal of work and have debts to pay which this sum will cover. I filed on this route for a railroad in 1871. Too early and nothing more was done under those papers. Later other companies followed and went the same way. About three years ago I filed articles of incorporation again under the name of the Coos Bay and Roseburg R. R. Company. After a year's struggle, I extended the route, made the articles more fully to the purpose under the name of the Oregon Southern Railway and Transportation Company, taking a deed from the former company. Now you have the Oregon Southern Improvement Company taking out

Articles of Incorporation word for word except the date, names of incorporators, place of business and part of the name. In all other respects they are identical. Covering the same route. And with it your company has the country in your own hands. You will make this one of the best if not the very best investments in our state or elsewhere. I cannot but think that it is the best investment for 90 miles of R. R. here or East. It will be so in the future. And the road in time should go East. It would traverse a better country than that of the O. R. & N., or even the Northern Pacific. A country now almost unknown to the general public. I made one report on this route. As really the originator and attorney of our companies I have given this subject a great deal of attention. And I know with proper management your company will be a grand success. Our books which are sent to you contain the chain of title from all other companies to ours and thence to yours. You will see by our records that the business was attended to very correctly. I would like very much to write more on the properties that form the basis of your enterprise, but I have already written more than I intended to when I began. But I must add that the property alone that Capt. Besse paid Luse \$130,000 for is worth—prospective value—upwards of a \$1,000,000. It takes the face and only face of the bay. The north beach being sand only. It is worth that sum now to any company. I regret your company has not taken a greater in-

terest in coal. But you will get the traffic anyway of that article.

Yours very truly,

C. F. CHADWICK."

Whereupon witness identified the original stock book of the Oregon Southern Improvement Co., showing the amount of stock issued and outstanding, which witness testified was one of the original books which came to him as vice president of the Southern Oregon Company, purporting to be the original stock book of the Oregon Southern Improvement Co. and was always treated by both companies as such book. Whereupon defendant introduced same in evidence as Defendant's Exhibit 206. Whereupon the witness identified the book, purporting to be abstract of titles of the lands of the Southern Oregon Company, including the Coos Bay Wagon Road land and testified that said book came to him among the files at Empire, in the office of the Oregon Southern Improvement Co. and subsequently the Southern Oregon Company, and was part of the records of said company; that the correspondence showed that it was prepared by Hazard & Wilson, the attorneys for the company, and has been treated by the company as the abstract of title to the property. Whereupon defendant offered same in evidence as Defendant's Exhibit 207.

Whereupon defendant identified the paper purporting to be a summary of opinion set forth and description of the lands described in Exhibit 207, and being apparently a key to Exhibit 207, and said

the same had come to him with the other books as part of the records and files of the Oregon Southern Improvement Co. and Southern Oregon Company and that the same were prepared by Hazard & Wilson, attorneys for the Oregon Southern Improvement Co. Whereupon defendant introduced the same in evidence, marked Exhibit 208.

Whereupon the witness testified that during the year 1886 John L. Howard was general Western agent of the Oregon Southern Improvement Co. Witness identified letter dated March 9, 1886, addressed to John L. Howard, and signed Hazard & Wilson, as being a letter written by Hazard & Wilson to John L. Howard and that the same was a part of the records and files kept by the Oregon Southern Improvement Co. and the Southern Oregon Company and treated and considered as the letter of Hazard and Wilson to John L. Howard. Defendant offered the same in evidence, marked Defendant's Exhibit 219, in words and figures as follows:

Letterhead of Hazard & Wilson, Empire City,  
Oregon.

"March 9th, 1886.

John L. Howard, Esq.,

48 Market St., S. F., Cal.

Dear Sir:

In re O. S. I. Co.'s titles.

At last we have finished our investigation of the O. S. I. Co.'s titles to all lands claimed by it, except town lots, and submit the following list of defects,



together with our advice as to the steps to be taken to remedy the same.

Lot 3 of Sec. 22-24-13 is not included by description in any deed from J. N. Knowles to O. S. I. Co., and although it would pass by the general quit-claim it might be advisable for the company to obtain a deed specially describing it.

One undivided half of SW $\frac{1}{4}$  of NW $\frac{1}{4}$  of Sec. 4-25-13, and 17-95/100 acres in NE $\frac{1}{4}$  of NW $\frac{1}{4}$  of Sec. 32-26-12 is not described in any deed from Luse to Knowles. Title would pass by general quit-claim, but it might be better to get a deed from Luse specially describing it.

E $\frac{1}{2}$  of SE $\frac{1}{4}$  of Sec. 21-25-13, Lots 2 and 3 of Sec. 20-25-15, and Lots 5, 6 and 7 of Sec. 30-25-13 does not appear to have been patented to Luse. As it was entered by Luse as far back as 1869 the patent ought certainly to have issued before this, and we have requested Mr. Webster to write to the Commissioner of the General Land Office regarding the matter.

The warranty deed from Luse to Knowles call for all of Sec. 32-25-13, but there is about 2 $\frac{1}{2}$  acres of said section that was never owned by Luse, being included in H. W. Sanford's donation claim. This is a small matter and hardly worth mentioning.

The defect in title to 53 acres in south part of Foley Donation Claim, owing to mistake in description, previously referred to by us, should have been cured by Luse, as the land is included in his warranty deed. Luse has never had such possession of

this land as would help the title, our Supreme Court having held that such possession must be *actual*, *notorious*, and *adverse*. It is unfortunate that the balance has been paid to Luse, as the company cannot hope to perfect this title without great expense. We suppose that as the matter stands it will be best to do nothing with regard to it at present.

In the deed from the State of Oregon to H. H. Luse for the tide land fronting the E. J. Foley Donation Claim, there are two mistakes in the description, to-wit: The place of beginning is given as the NE $\frac{1}{4}$  of said Foley claim instead of NW $\frac{1}{4}$ , and the fourth course and distance are omitted entirely. This can only be cured by a new deed from the state and should have been done at Luse's expense.

The deed from Morgan H. Marple to H. H. Luse for 5 $\frac{1}{4}$  acres in SW corner of A. N. Foley Donation Claim was acknowledged before John L. Knight, clerk of the County Court for Pleasants Co., West Virginia, but there is no certificate of conformity as required by the laws of this state. The original deed is not in the possession of the O. S. I. Co. and we fear that the defect cannot be remedied without great expense to the company and it will perhaps be best to let it stand for the present. This is another matter that should have been attended to at H. H. Luse's expense.

The Perry B. Marple Donation Claim of 53 acres in south part and 5 $\frac{1}{4}$  acres in SW corner of A. N. Foley's Donation Claim were originally owned by Perry B. Marple, who is said to have died intestate,

and his father Morgan H. Marple claimed to be his heir and deeded to Luse. This is possibly all correct, but in case the company should at any time get into litigation over this land and have to show a title it would be necessary for him to *prove* all this, and it might be advisable for them to take the necessary steps to perpetuate the testimony as to these facts. As the Marples live in Virginia this would be likely to entail considerable expense, but every year adds to the cost and difficulty of obtaining the necessary evidence.

SW $\frac{1}{4}$  of SW $\frac{1}{4}$  of Sec. 1-26-12, conveyed by Crocker to Besse, was patented by the United States to Peter Baereno as well as to the C. B. M. W. R. Co.—Baereno's right appears to be the better of the two, and Crocker ought to be willing to refund the purchase price.

NE $\frac{1}{4}$  of SE $\frac{1}{4}$  of Sec. 3-26-12 was conveyed by the C. B. W. R. Co. to Edward Irvine prior to the deed to Miller, and Irvine or his grantees have been in possession ever since the former's purchase. This land was included in the deed from Crocker to Besse, and as Crocker had no title whatever he ought to be willing to refund the purchase price of this piece also.

In the deed from Jasper A. Yoakum to H. H. Luse for Lots 2, 3 and 4 of Sec. 7-26-12 the certificate of acknowledgment is fatally defective, and a new deed had better be obtained from Yoakum. This can probably be done without much trouble. There are some other slight defects in the chain of title to

these lots, but said defects are not of very much importance and could not be remedied without considerable expense. This title should have been perfected at Luse's expense.

In deeds from Dully to Luse for four pieces in Sec. 29-26-12 the acknowledgments are very defective and a new deed had better be obtained from Dully. The description of three of these pieces in deed from Luse to Knowles is very indefinite and it might be well to get new deed from him describing them correctly, although they are, of course, covered by the general quit-claim. One of these pieces ought to be surveyed before new deeds are drawn, as the present description is very indefinite, running along fences and ditches. The expense of all this ought properly to be borne by Luse.

NW $\frac{1}{4}$  of SW $\frac{1}{4}$  of Sec. 25-27-12 was deeded by C. B. W. R. Co. to Besse, but was never patented to or owned by the C. B. W. R. Co. The latter company gave a warranty deed and should be made to refund the full value of this piece.

Fractional NW $\frac{1}{4}$  of NE $\frac{1}{4}$  (Lot 6) of Sec. 3-28-6 is erroneously described in deed from Crocker to Besse as "fractional NW $\frac{1}{4}$ "—new deeds should be obtained from Crocker.

Lots 3 and 4 of Sec. 27-28-7 deeded by Crocker to Besse were never patented to the C. B. M. W. R. Co. and never owned by Crocker, the patent erroneously describing them as in Sec. 7 in which latter section there are no such lots. The C. B. W. R. Co. should



release Lots 3 and 4 of Sec. 7 to the United States and obtain new patent for lots in Sec. 27.

Section 7-28-10 is an unusually large section, containing 781-84/100 acres, and contains a row of lots numbered 1, 2, 3, and 4, on west side of section in addition to the ordinary full section, to-wit, 640 acres. The patent from United States to C. B. M. W. R. Co. conveys all of the sections, but the deed from C. B. W. R. Co. to Besse only calls for Lots 1, 2, 3 and 4,  $E\frac{1}{2}$  of  $W\frac{1}{2}$ , and  $E\frac{1}{2}$  of section. This would leave a strip between the lots of  $E\frac{1}{2}$  of  $W\frac{1}{2}$  unconveyed. Secs. 19 and 31 of the same township are in a similar condition. A new deed from the C. B. W. R. Co. should be obtained for these sections.

Section 7-29-10 contains Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 in addition to the  $E\frac{1}{2}$  and its area is probably about 800 acres, but patent from United States to C. B. M. W. R. Co. and deed from it to Besse only call for Lots 1, 2, 3, and 4,  $E\frac{1}{2}$  of  $W\frac{1}{2}$  and  $E\frac{1}{2}$ , containing 641-76/100 acres, leaving a strip through center of section still belonging to the United States. This was probably an oversight and if the land was worth the trouble a patent for it could most likely be obtained from the United States to C. B. M. W. R. Co., and we presume said company would sell it to the O. S. I. Co. for the same price as the rest of the land. We have no information as to the value of this piece of land.

An undivided one-fourth of the "Crocker Lands" was originally conveyed by John Miller to Mark

Hopkins; this  $\frac{1}{4}$  appears to have been deeded to Crocker by Mary Frances Sherwood Hopkins, but who she was or how she obtained title there is nothing here to show. We suppose it was all right, but presumptions don't go for much in the matter of titles to real estate. You can probably ascertain all the facts regarding this.

The long-looked-for from John Miller, alias Ambrose Woodroof, and Jennie C. Woodroof his wife to Crocker et al. was not among the deeds found by Capt. J. N. Knowles and forwarded by you to Webster some time ago, but there was a deed from John Miller and *Lizzie* Miller his wife to Edward P. Thayer, dated Nov. 1st, 1880. Is Jennie C. dead or divorced, or is Miller a muchly married man like our Oregon Senator? This deed from Miller to Thayer is not recorded. It will probably be best to place it on record as Besse got a conveyance from Thayer. The original deed from Thayer to Besse we think is in the East. It has been recorded in Coos County, but not, we think, in Douglas. It had better be sent here for record in the latter county.

In addition to the defects herein mentioned there are numerous minor ones which we did not consider of sufficient importance to say anything about, as we do not apprehend that they will ever cause the company any trouble.

We did not understand our instructions to authorize us to examine the titles to town lots, but think it would be well for us to go through Mr. Clement's abstract of Empire City and see if there

are any defective titles shown therein which could be remedied.

The "Tract Book" is finished so far as it can be at present, but there will be further work to do on it after the defective titles are perfected as far as possible. Then after an examination has been made on the lands themselves (a thing which, we presume, will be done, sooner or later) the notes of such examination should be made in the spaces left therefor in the Tract Book. For these reasons we hope you will change your mind about sending the book East. In its present unfinished condition it would be of no use to the stockholders there, whilst its absence would prevent the making of necessary addition here, and entirely frustrate the purpose of the book. Mr. Loggie, to whom we mentioned the matter, thinks that while very useful here it would be valueless in the East in its present condition. We await your further instructions regarding the two matters last above mentioned.

There are certain matters that require an examination of the records of the U. S. District Land Office at Roseburg. Our Mr. Wilson has to go to Roseburg next week and will attend to this and we will write you again on his return. We have reason to believe that conflicting patents have been issued by the United States for part of the C. B. W. R. land, which could only be ascertained from the land office records.

In re partition suit.

We will again urge upon you the necessity of a release of the mortgage on the 4/7 of Bersheba Foley claim to save the company having to pay all the costs in the suit and gaining nothing thereby. The time is getting very short now and unless the release comes before long we shall not have time to get the property advertised and sold before next term of Court.

In re Webster's bond.

There is no necessity to renew the bond.

In re Hicks vs. O. S. I. Co.

The testimony of Mr. Metcalf came to hand all right.

Very truly yours,

HAZARD & WILSON.

P. S.—Mr. Loggie has created a very favorable impression here."

Whereupon witness identified letter addressed to John L. Howard, April 5, 1886, signed by Hazard & Wilson, as being one of the letters contained in the records and files of the Southern Oregon Company and the Oregon Southern Improvement Co. and that the same was the letter of Hazard & Wilson. Whereupon the defendant introduced the same in evidence, being Defendant's Exhibit 222, as follows:



Letterhead of Hazard & Wilson, Empire City,  
Oregon.

“April 5th, 1886.

John L. Howard, Esq.,

48 Market St., S. F., Cal.

Dear Sir :

In re O. S. I. Co.'s Titles.

Our Mr. Wilson returned from Roseburg on the 2nd inst. On examination of the records of the U. S. District Land Office he found the following defects in the company's titles to certain of the Coos Bay Wagon Road Lands :

1st. The  $S\frac{1}{2}$  of  $SE\frac{1}{4}$  of Sec. 13-27-12 was patented to Fan W. Moore July 20th, 1881.

2nd. Lots 6 and 7 of Sec. 23-26-13 and Lot 8 of Sec. 5-26-12 were claimed by and allowed to the State of Oregon as swamp lands Aug. 7th, 1872, and Dec. 3rd, 1884, respectively.

3rd.  $N\frac{1}{2}$  of  $N\frac{1}{2}$ ,  $SE\frac{1}{4}$  of  $NW\frac{1}{4}$ , and  $SW\frac{1}{4}$  of  $NE\frac{1}{4}$  of Sec. 29-25-12 and Lots 5 and 6 of Sec. 5-26-12 were restored to public domain by letter F of Commissioner of General Land Office, dated May 21st, 1884.

4th.  $SW\frac{1}{4}$  of  $SW\frac{1}{4}$  of Sec. 1-26-12 was patented to Peter Bureno.

5th.  $NW\frac{1}{4}$  of  $NW\frac{1}{4}$  of Sec. 7-28-7 was patented to Henry G. Crow April 20th, 1883.

6th.  $NE\frac{1}{4}$  of  $NE\frac{1}{4}$  of Sec. 9-28-7 was allowed to Irvine Blake as a homestead June 12th, 1884; Blake claiming settlement January 1st, 1879.

We shall at once communicate with the General Land Office at Washington regarding the foregoing defects and will defer any comments thereon until we receive a reply from the department.

Very truly yours,

HAZARD & WILSON.

P. S.—The lands described in this letter were all conveyed by Crocker to Besse, Besse to Gray, and Gray to O. S. I. Co., and are all included in patent from United States to C. B. M. W. R. Co.

H. & W.”

Whereupon the complainant called George W. Loggie, who testified in substance as follows:

That he was manager of the Oregon Southern Improvement Company and the Southern Oregon Company, from 1885 until 1892. That he knew the granting act contained the restrictive provises, requiring the grantee to sell the lands at a price not to exceed \$2.50 an acre and in quantities not to exceed 160 acres to a single purchaser and that this was generally known in the Coos Bay country. That he had heard the matter discussed by business men as well as by others interested in the land. That the restrictive provisions were discussed at various times in his office and he had talked them over with Hazard & Wilson, attorneys for the company. That in going among the settlers upon the lands, he learned from them that Dr. Hamilton had promised to give them deeds at \$2.50 an acre. That a number of them came to the office of the Oregon South-

ern Improvement Company and asked if they were to get the lands for \$2.50 an acre, as promised by Dr. Hamilton, and to all these people he had replied he was not authorized to sell any of the lands. While he was with the company from 1885 to 1892, there was not much demand for timber land or for lands along the mountains that were gravelly and precipitous. From correspondence and conversation with Elijah Smith, president of the company, he learned that he was not to sell any of the grant lands. That he reported to Smith the arrangements which the settlers said they had with Dr. Hamilton, and was instructed by him to eject all settlers from the lands, and for the purpose of obtaining from them recognition of the company's title he had the settlers sign applications to purchase and afterwards collected rent from them. The settlers were, he said, willing to pay \$2.50 an acre for the land and in his opinion, the company could have sold a lot of the bottom lands which were heavily timbered, for farming purposes.

The witness further testified that he was familiar with the general character of the lands and that, in his opinion, 60% of them could be cultivated, after they were cleared and the timber taken off, and 15% in their natural condition. He estimated the cost of clearing the timber land at from \$60 to \$100 an acre and said that he based this opinion upon his experience in clearing similar land. He further said that he was one of the incorporators of the Southern Oregon Company. That James Webster

was a bookkeeper, employed by the same company, and S. Z. Hazard was its attorney. That he bought in the property of the Oregon Southern Improvement Company at the foreclosure sale under instructions from it, as a mere figurehead, for Elijah Smith or Elijah Smith's attorney. That the foreclosure proceedings were in charge of Mr. C. A. Dolph. One of the shares of the Southern Oregon Improvement Company was in his name, but in fact was owned by Elijah Smith or Prosper W. Smith, his brother, and that after the organization of the Southern Oregon Company, he managed the property as he had done for the Oregon Southern Improvement Company. That no new books were opened. That the old accounts were continued as the accounts of the Southern Oregon Company, and everything was done the same as if the Southern Oregon Company was identified with the Oregon Southern Improvement Company. That he obtained an abstract covering the grant lands and procured an opinion from Attorney Hazard thereon. He could not, he said, state specifically what the opinion set forth as to the title, but knowing the thoroughness with which Hazard from the United States. This abstract was prepared prior to the organization of the Southern Oregon Company. The witness further stated that he was at first manager of the Oregon Southern Improvement Company and then of the Southern Oregon Company, and was, in addition, a director and vice president of the last named company. That the policy of the two companies in re-



fusing to make sales within the terms of the restrictive proviso retarded the development of the country where the grant lands were situated.

The defendant duly objected to all the testimony given by George W. Loggie as to his knowledge of the terms of the granting Act and as to the fact that the provisions of that Act were discussed by the various persons, or that the settlers upon the lands, or any persons, heard of them or that applications were made to buy the lands for \$2.50 an acre, or that Doctor Hamilton promised to sell at that figure; or to the witness' statements of the percentage of those lands that could be cultivated after the timber was taken off, and they were cleared, for the reason that all said testimony was incompetent and immaterial, and the defendant still insists on that objection.

As to the terms of the grant and his knowledge of them, this witness said:

“Q. You have a distinct recollection, have you, of discussing the terms of the grant?

A. Oh, yes, I remember talking it over with Hazard, yes.

Q. And you say you discussed with him the terms of that grant with reference to these lands being sold to settlers or actual settlers?

A. Yes, I remember those two distinct terms. I think they were applicable to—one to the Coos Bay Wagon Road and one to some other grant; one was settlers and the other actual settlers. I remember of those two, of the difference in those two terms.

Q. You are positive that the condition of the grant to the Coos Bay Wagon Road Company was that the land should be sold to settlers or to actual settlers, whichever one of those terms may apply?

A. Well, I don't remember of reading it, but that was the general opinion.

Q. And that is the opinion you are testifying to here as being entertained by everybody down there?

A. It was generally conceded that that was the—

Q. Generally conceded by everybody that that was the terms of the grant?

A. Yes, sir." \* \* \*

"Q. Now, before the removal of the timber and the land cleared, what percentage of it can be used for cultivation?

A. Well, I don't know.

Q. Well, you don't know the other, but you have a judgment about it; now give us your judgment on this.

A. There would be a small per cent. That portion of the land lying near the creek banks and in the streams would be suitable for cultivation, perhaps a small amount of labor in clearing.

Q. Well, how large a per cent of the grant would that be?

A. A pretty small per cent.

Q. Well, let's get your best judgment on that.

A. Well, I don't know; it will only be a guess.

Q. Well, guess at it; nobody could do any better.

A. Not more than 15 per cent.

Q. Would you be willing to say that 10 per cent of it could be, positively?

As to the clearing of timber and his estimate of it, this witness admitted that he did not know what it would cost for logging it off or burning it off, or burning logs off after the trees were cut down, or grubbing the stumps out after the logs were burned off.

Fank Batter, being called as a witness by the complainant, testified in substance as follows:

That he had been an employee of the Oregon Southern Improvement Company and Southern Oregon Company. That his duties as such employee required him to visit the settlements on the grant lands. That the settlers were familiar with the fact that the lands had been granted by the government and that the impression prevailed amongst them that they were going to get the lands for \$2.50 an acre and that, in 1891, he reported to his employers the views of the settlers. That he had no authority to sell lands and that the company never offered any for sale during his time. He introduced a number of reports which he had made to the company, and which show the willingness of the settlers to purchase the land, in accordance with the restrictive provisos. The company, he said, settled with some of those men, but others were unable to purchase from the company the lands which they had settled upon.

The defendant duly objected to all the testimony given by this witness that the settlers were familiar

with the fact that the lands had been granted by the government or that the impression prevailed amongst them that they were going to get the lands for \$2.50 an acre or any testimony as to the knowledge of the settlers concerning the provisions of the Act, or otherwise; and also to the reports introduced by this witness, for the reason that all said testimony is immaterial and incompetent; and the defendant still insists on said objection.

George K. Quine, called as a witness by the complainant, testified in substance as follows:

That he was the sheriff of Doguas County and had resided therein all his life, upwards of fifty-two years. That he had often talked with the settlers on the grant lands and that it was generally understood among them that the land was to be sold under the grant at \$2.50 per acre.

Defendant duly objected to the above testimony given by George K. Quine as to his conversation with the settlers, or their knowledge of the terms of the grant, for the reason that the same is incompetent and immaterial, and defendant still insists on said objection.

A. T. Siglin, called by the complainant, testified in substance as follows:

That he had resided in Coos County since 1871. Was formerly deputy collector of customs, county treasurer and sheriff. That it was generally at the "commencement of this grant," that the lands must be sold at \$2.50 an acre, in quantities of 160 acres, to an individual, and he further stated that



anyone who went among the settlers and talked with them would have learned that this was the general belief amongst them. Between 1888 and 1892, Elijah Smith told him that the settlers claimed they had an understanding with the Coos Bay Wagon Road Company, that they were to get the lands upon which they lived, at \$2.50 an acre, in accordance with the terms of the granting act, but that the Southern Oregon Company was not bound by the agreement between them and the Wagon Road Company. That prior to 1900, timber which could be logged up the Coquille River was in demand. That if the different companies which owned the land, including the Wagon Road Company and the defendant had been willing to sell within the terms of the grant, most of the lands could have been readily disposed of, at least the greater portion of them. That some years ago, people along the road were willing and anxious to purchase. He further said that he had been over different parts of the land and estimated that 90% of the grant was susceptible of tillage and fruit raising and that 10% was worthless. In giving his estimate, he considered the lands after they had been cleared. He said he never saw or heard of United States troops passing over the Wagon Road. That prior to the construction of the road, mail was brought into the Coos Bay country by pack horse and that after its construction during the winter months the same method had to be resorted to. He further said that the failure to sell the grant lands had retarded the development

of the country, as is always the case where large tracts of land are held idle.

Earl Harlocker, called by the complaint, testified in substance as follows:

That he had resided in Coos County since 1871 and worked on the construction of the Wagon Road. That he was acquainted with the settlers in the neighborhood of the road and had talked with them concerning the terms of the grant, and that it was always understood by them that the grant limited the quantity of land that could be sold to one person to 160 acres and the price to \$2.50 an acre. Also that anybody amongst the settlers could have ascertained this fact. That between 1871 and 1880 the Coos Bay Wagon Road Company would not sell any land excepting a few tracts.

The witness further said that he had been statistical correspondent for the United States Agricultural Department for thirty years and as such had classified the lands of Coos County. That 90% of the grant lands were tillable after clearing and 10% barren, and that he had so reported to the government. In the present condition of the lands, he estimated that only 5% of them could be cultivated, but this he said was due to the fact that you could not cultivate any brush land until you had removed the brush. He also said that he had never seen or heard of United States troops passing over the road. That prior to the building of the road, mail was carried into the Coos Bay Wagon Road country on pack horses and that they had to continue this dur-

ing the winter months after the completion of the road. He also said that if the Coos Bay Wagon Road Company had sold the land as required by the grant, there would have been many more settlers along the road.

G. W. Stevenson, called by the complainant, testified substantially as follows:

That he had resided in the vicinity of the Coos Bay Wagon Road since 1871 and had frequently heard the settlers along the road speak of the limitations of the granting act, whereby the grantee was required to sell the lands at a price not to exceed \$2.50 an acre, and in quantities of not to exceed 160 acres to one person. That anybody going amongst the settlers and talking with them upon the subject would have learned of these limitations.

J. D. Laird, called by the government, testified in substance as follows:

That he had resided on the Coos Bay Wagon Road since 1880. That he had heard the settlers along the road discuss the terms of the grant and that it was generally understood amongst them that the grantee was required to sell the lands at \$2.50 an acre and in quantities not exceeding 160 acres to one person.

W. R. Murray, called by the complainant, testified in substance as follows:

That he settled on a tract of the grant land in 1886, and that it was then generally understood in his neighborhood that the owner of the grant was

required to sell the lands to actual settlers at \$2.50 an acre. He further stated that he improved the tracts upon which he had settled, by building a house, barn and other structures and then applied to the president of the company to purchase, and was told that the land was not in the market. In his application, he mentioned no price. George Loggie, manager of the Southern Oregon Company, came to his place and ordered him to leave the land, but he desired it for his home and offered to buy it, whereupon Loggie told him that it was not for sale and in pursuance to the latter's orders, he left the place and abandoned his improvements. The company never offered to lease the land to him and the place has remained unoccupied ever since. He estimated that 75% of the lands could be used for pasture and farming, after clearing. He also said that he had worked upon building wagon roads all his life and that he thought the wagon road built by the Coos Bay Company cost from \$500 to \$700 per mile. Concerning the bottom lands in the grant, he said that they were worth from \$100 to \$200 per acre.

G. P. Miller, called by the complainant, testified in substance as follows:

That he had resided in the vicinity of the Wagon Road since 1874. That it was the general understanding amongst the settlers along the road that the granting act restricted the price of the land to \$2.50 an acre and prohibited the selling of more than 160 acres to one person. That his father had made unsuccessful efforts to purchase 160 acres of



the land, which he had settled upon, first from the Coos Bay Wagon Road Company and then from the Oregon Southern Improvement Company. That as early as 1875 there were quite a few settlers of the grant lands who desired to purchase but could not do so, because the lands were not on the market. That one-fifth of the grant in Coos County was good farm land and the remainder would make fine grazing land after the timber had been removed. That portion of the land which could not be farmed would be suitable for fruit raising. He further testified that the settlers who were put off the lands did not buy because the Southern Oregon Company would not give them warranty deeds.

J. L. Barker, called by the complainant, testified in substance as follows:

That he settled on a part of the grant land in 1874. That it was generally understood among the settlers that the grantee was required to sell the lands at \$2.50 an acre, in quantities not to exceed 160 acres to one person, and that this had always been the understanding in that country, and was often the subject of conversation among the people. That he was told by Dr. Hamilton, president of the Coos Bay Wagon Road Company, that the company was not permitted to charge more than \$2.50 an acre for the land and, relying upon this statement, he made improvements on his place worth \$600 to \$700 and later applied to Dr. Hamilton to purchase it, but was told the land was involved in a law suit. He subsequently and unsuccessfully applied to Met-

calfe to purchase it. In 1892, he explained to Elijah Smith the understanding he had received from Dr. Hamilton, but was never able to get the land, although he was willing to pay \$2.50 an acre. Subsequently he leased it from the defendant company. In the beginning, the Wagon Road Company sold land, but later refused to do so.

Mr. J. Krantz, called by the complainant, testified in substance as follows:

That he settled on the grant land in 1884 and it was then generally understood among all the settlers along the Wagon Road that the company was required to sell the land at \$2.50 an acre and in quantities not exceeding 160 acres to one person. That he had been encouraged to settle by Dr. Hamilton. That he made unsuccessful efforts to purchase the land from Dr. Hamilton and Elijah Smith. The latter told him the company could not dispose of the land. He was willing to purchase at \$2.50 an acre, but after residing thereon for fourteen years and making improvements worth \$4000, he was compelled to abandon it because he could not get title.

D. C. Krantz, called by the complainant, testified in substance as follows:

That he resided on a homestead within four miles of the Wagon Road since 1882. That it was always understood among the people in the neighborhood that the company was required to sell the grant lands at \$2.50 an acre and in quantities of 160 acres to one person and that anybody going

amongst the people and talking with them upon the subject could have learned of these limitations upon the grants.

J. L. Crosby, called by the complainant, testified substantially as follows:

That he had resided upon the grant lands since 1884. That it was generally understood amongst the people that the lands had to be sold in quantities not greater than 160 acres to one person and for a price not exceeding \$2.50 an acre. That his father attempted to purchase the land upon which he had settled from the Oregon Southern Improvement Company, offering \$2.50 an acre therefor, but was unsuccessful, the company stating that it was not ready to sell. His father had placed improvements upon the land worth at least \$1000, but was finally compelled to move away, as there was no prospect of being able to secure title. After his father had left, the witness remained on the land and unsuccessfully attempted to purchase it, but was given to understand by the company that it would not sell, so he took a lease on the premises.

J. M. Hutson, called by the complainant, testified in substance as follows:

That he resided on a tract of the grant land from 1871 to 1879. That it was generally understood at that time among the people along the Wagon Road that the granting act required the land to be sold at \$2.50 an acre, in quantities of 160 acres to each purchaser, and this fact could be learned by anyone by going among the settlers and



talking to them about the matter. That after he had made his settlement, he applied to Dr. Hamilton to purchase the land upon which he had settled, but was informed that the company was not ready to sell, but that when it did sell it would have to do so at \$2.50 an acre. Relying upon this statement, he made improvements on the land worth \$1,000, but had to abandon them in 1879, because he could not secure title, the reasons given by the representative of the company being that the patents had not been issued or something of that nature. All his dealings were with Dr. Hamilton. Other people who had settled about the same time he had experienced treatment similar to that accorded to him. He also said that the hill land in the vicinity could be used for pasture after removing the timber.

J. S. Clinton, called by the complainant, testified in substance as follows:

That he had resided in the Coos Bay country since 1884 and that he always understood from conversations with people living there that the grant lands were to be sold at \$2.50 an acre, in quantities of not more than 160 acres to one person. He further testified that in 1905 he attempted to purchase some land from the Southern Oregon Improvement Company at \$2.50 an acre, but that Elijah Smith refused to sell it. Prior to making the attempt to purchase, he had leased the land from the company. One W. H. Harmon, in his presence, also applied to purchase the grant land, but his application was refused by Smith.



J. C. Wilson, called by the complainant, testified in substance as follows:

That he had resided in the Coos Bay country for twenty-four years. That the terms of the granting act requiring sales of the land at \$2.50 an acre and in quantities of not more than 160 acres to a single purchaser had been a matter of general conversation among the people during all that period. That at many times during his residence in that locality he had attempted to purchase 160 acres of the grant land. At one time he made application to Shine, manager of the company, and offered \$2.50 an acre. Shine represented that he had no land to sell. He said he was going to settle upon the land and was informed that if he did he would be a trespasser. That he made another application to purchase 160 acres, offering \$4.00 an acre, and received the same reply as on the first application. The land which he sought to purchase was well suited to agricultural purposes.

A. M. Simpson, called by the defendant, testified substantially as follows:

That he had operated saw mills in the vicinity of the grant lands since 1856 and had heard the conditions of the grant discussed from the time the Wagon Road was being constructed. That the people generally understood that the lands were to be sold according to the terms of the granting act, in quantities of 160 acres and at \$2.50 an acre.

He further testified that in 1910 he purchased

a section of the grant lands from the Southern Oregon Company and paid therefor \$19,000.

A. W. Johnson, called by the defendant, testified substantially as follows:

That he had resided near the Coos Bay Wagon Road since 1889 and that the requirements of the grant were that the lands must be sold in tracts of 160 acres, at a price not to exceed \$2.50 an acre. That this had often been discussed by the people of his neighborhood.

A. Admundson, deputy clerk of Coos County, testified substantially as follows:

That there were recorded in his office between 1907 and 1908, 448 applications to purchase grant lands, practically all of which were acknowledged before George Watkins and were filed by him.

Isaac Taylor Weekly testified substantially as follows:

That Dr. Hamilton had informed him that the grant land would be sold to settlers at \$2.50 an acre and that others were told the same thing. That the settlers did not get the land they had settled upon and that near his home there is quite a lot of unsold grant land that would make good homes. That he never saw or heard of United States troops traveling over the Coos Bay Wagon Road. That prior to the building of that road, the mail was carried into the Coos Bay country by pack horses and had to be brought in the same way during the winter months, after the construction of the road.

He further testified that if the grantees had sold the land according to the terms of the grant the population in the neighborhood of the road would be much greater than it is, and that the failure to comply with those conditions had retarded the settlement of the country.

John Fitzgerald testified substantially as follows:

That he lived in the neighborhood of the grant land since 1863, although not continuously. That a settler could make a living on 160 acres of the hill land within the grant, and mentioned a number of settlers who had established and maintained homes on such lands.

W. F. Burton testified substantially as follows:

That he had settled on 160 acres of the grant land in 1880, being told prior to the settlement that the land would be sold to him in a tract of 160 acres at \$2.50 an acre. Afterwards the Southern Oregon Company demanded \$10 an acre for the bottom land and \$5 an acre for the hill land. He represented that according to his understanding the land was to be sold for \$2.50. He finally purchased fifty-three acres for \$200. But later he made an unsuccessful attempt to purchase nine additional acres from the defendant company. That mountain lands in the grant are heavily timbered.

J. D. Laird testified substantially as follows:

That he lived in Coos County and had become acquainted with the Coos Bay Wagon Road in June,

1880, and that farm land in the community in which he lived is worth \$200 an acre. That his people had been offered that much, but they refused to sell. He further said that for a long time a very substantial toll was collected for the use of the Wagon Road.

A. J. Radbaugh was called and testified substantially as follows:

That in 1885 he and his brother applied each for eighty acres of the grant lands, offering \$2.50 an acre, and that their applications were refused by the Oregon Southern Improvement Company, who offered to sell at \$3.00 an acre. He now has eighty acres of this land, leased at \$10 a year. He mentioned several persons residing on mountain land as early as 1875 and stated that in his vicinity the mountain land was all taken up.

Sarah Haughton testified substantially as follows:

That she with her husband, now dead, settled on a tract of the grant land in 1874 and, after improving it, her husband endeavored to purchase the land of Dr. Hamilton, but was informed that the company would not sell in small tracts, as it desired to keep it intact and sell the whole grant at one time. Her husband had the means to purchase 160 acres and desired to do so. They had built a comfortable home on the place and used about thirty acres for agricultural purposes, made their living thereon and raised seven children. Later on, her husband endeavored to purchase the land from the



successors of the Coos Bay Wagon Road Company and offered to pay \$2.50 an acre for it, but was refused. About 1894, the Southern Oregon Improvement Company brought suit to eject them from the land. Prior to this, Mr. Shine, manager of the company, said to her husband that the company, his employer, wanted to keep the land intact and did not want to sell it in small tracts.

Almon S. Buell, called as a witness, testified substantially as follows:

That he resided near the Coos Bay Wagon Road from 1870 to 1887 and that, when cleared, the bottom land would make fine agricultural land and the mountain land could be used for grazing. He also said that for a time a substantial toll was exacted for the use of the Wagon Road.

Marshall J. Kinney, called as a witness, testified substantially as follows:

That he had procured from the Southern Oregon Company an option on the lands for \$65,000 cash and then attempted to sell the lands before completing the purchase. He entered into negotiations with several. Finally a Mr. Wood, of San Francisco, was willing to purchase, but, upon examination of the title, found it was defective and refused to complete the deal. Prior to that time, Mr. Kinney said that he had learned from Major Kinney that the title was defective, by reason of the restrictive conditions of the grant. As a result, Mr. Kinney did not complete the transaction with the South-

ern Oregon Company and forfeited the money which he had paid.

It is stipulated that C. A. Dolph, at the time of his correspondence concerning the foreclosure of the mortgage given by the Southern Oregon Improvement Company to secure its bonds, was a member of the firm of Dolph, Bellinger, Mallory and Simon, and was, at the time of his death in 1914, a member of the law firm of Dolph, Mallory, Simon & Gearin. That he instituted the foreclosure suit against the Southern Oregon Company and from that time down to the time of his death, was, as a member of the firm, attorney for Elijah Smith and the Southern Oregon Company. It is further stipulated that Rufus Mallory came into the law firm above mentioned in September, 1883, and continued therein until his death and that he is the same Rufus Mallory who was a member of Congress at the time the bill was pending in Congress, which substantially became the act of March 3, 1869, granting the lands in question to the State of Oregon.

E. N. Harry, called as a witness, testified substantially as follows:

That he had been road supervisor in Coos County for upwards of twenty-five years. Had been over the Coos Bay Wagon Road many times and was familiar with it and that the average cost of the road was about \$500 a mile. He also said that a substantial toll was for a time collected for the use of the road.

A large number of exhibits were introduced in evidence, from which it appears that the Coos Bay Wagon Road Company was an Oregon corporation, which filed its articles with the Secretary of State of Oregon on April 15th, 1868. That it had a capital stock of \$40,000, and was organized for the purpose of constructing and maintaining a wagon road from Coos Bay to Douglas County, Oregon. Supplemental articles were filed January 31st, 1870, which provided that the contemplated road should extend from Coos Bay to Roseburg. On October 22nd, 1870, the Legislature of Oregon passed an act granting to the Wagon Road Company all the lands which had been granted to the State by the Act of Congress approved March 3rd, 1869. The legislative act recites the passage of the Granting Act of March 3, 1869, and then provides in Section 1:

“That there is hereby granted to the Coos Bay Wagon Road Company all lands, rights of way, privileges and immunities heretofore granted or pledged to this state by the Act of Congress in this Act heretofore recited, for the purpose of aiding said company in constructing the road mentioned and described in said Act of Congress, upon the conditions and limitations therein prescribed.”

On March 11th, 1870, Mr. Aaron Rose, as president of the Wagon Road Company, sent to the Commissioner of the General Land Office a letter which reads in part:

“Herewith I have the honor to transmit to you copy of an Act of the Legislative Assembly of the State of Oregon, entitled, ‘An Act for Donating Certain Lands to Coos Bay Wagon Road Company.’ ”

The Wagon Road Company again amended its Articles of Incorporation on April 11th, 1872, by inserting the following:

“This corporation hereby assents to and accepts the grant of lands, the right of way and all of the conditions and provisions of the Act of Congress, approved March 3rd, 1869, entitled ‘An Act Granting Lands to the State of Oregon to Aid in the Construction of a Military Wagon Road from the Navigable Waters of Coos Bay to Roseburg in Said State,’ and also of the act of the Legislative Assembly of the State of Oregon approved October 22nd, 1870, entitled ‘An Act Donating Certain Lands to the Coos Bay Wagon Road Company,’ and also assents to and accepts all further acts of said Congress or of the Legislative Assembly of the State of Oregon, granting lands or other property or things in aid of the construction of said road, \* \* \* also to organize, establish and maintain a system of emmigration from other states and territories of the United States and from Europe to the State of Oregon.  
\* \* \* ”

The first list selecting lands was prepared by



the Wagon Road Company on March 22nd, 1873, and contains the following:

“The Coos Bay Wagon Road Company, under and by virtue of the Act of Congress, entitled, ‘An Act Granting Lands to the State of Oregon to Aid in the Construction of a Military Wagon Road from the Navigable Waters of Coos Bay to Roseburg in Said State. Dated 3d March, 1869,’ and the Act of the Legislative Assembly of the State of Oregon, approved the 22nd day of October, 1870, conveying said ‘grant’ to the Coos Bay Wagon Road Company \* \* \* hereby make and file the following list of selections of public lands, claimed by said company as enuring to it and to which it is entitled under and by virtue of the grants and provisions of said Act of Congress.”

To this list was attached the following oath:

“I, A. R. Flint, being duly sworn, depose and say that I am the land agent of the Coos Bay Wagon Road Company. That the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by the said company as enuring to the State of Oregon, to aid in the construction of the Wagon Road \* \* \* for which a grant of land was made by the Act of Congress approved on the 3rd day of March, 1869. \* \* \*”

The Wagon Road Company, prior to the issuance of any patents, sold and conveyed to fifty-three

individuals approximately 6963 acres the aggregate consideration stated in the deeds being \$17,500.

The United States issued to the Wagon Road Company four patents, one dated February 12th, 1875, embracing 42,496-93/100 acres; one dated March 18th, 1876, embracing one thousand and eighty acres; one dated November 8th, 1876, embracing 61,111-53/100 acres, and one dated February 17th, 1877, embracing 132-65/100 acres, a copy of each of said patents excepting the description of lands conveyed is set out above.

The Oregon Southern Improvement Company was organized under the laws of Oregon on January 14th, 1883, by a number of New Englanders, prominent amongst whom were Elijah Smith, Prosper W. Smith, William Rotch, William J. Rotch, father and son, Capt. W. H. Besse, and W. M. Crapo. The first president and treasurer and assistant treasurer were Capt. W. H. Besse and William Rotch, respectively. In 1884, Elijah Smith became president and Prosper W. Smith treasurer.

The Southern Oregon Company, an Oregon corporation, was organized by the bondholders and stockholders of the Oregon Southern Improvement Company, on March 28, 1887, for the purpose, as expressed in its Articles of Incorporation, of purchasing the property of the former company at a sale made in pursuance of the foreclosure of the trust deed given by the Oregon Southern Improvement Company to secure its bonds. For many years it operated canning works and a large saw mill upon

lands other than the grant lands, procured from the Coos Bay Wagon Road Company, and controlled the chief industries of Empire City and Coos Bay.

The Wagon Road Company on May 31st, 1875, conveyed to John Miller 35,534 acres of the grant lands. These lands were by Miller conveyed to Huntington, Crocker, Hopkins and Stanford, June 22nd, 1875; by Huntington and the other associates of Crocker to Crocker by deed of March 22nd, 1892; by Crocker to William H. Besse by deed of December 20th, 1883; by Besse to Russell Gray, by deed of December 29th, 1883, and by Gray to the Oregon Southern Improvement Company by deed of January 5th, 1884.

The Wagon Road Company on January 17th, 1884, conveyed to William H. Besse 61,143-37/100 acres, the balance of the grant, who afterwards conveyed the same lands to the Oregon Southern Improvement Company by deed of June 4th, 1884. On January 4th, 1884, the Oregon Southern Improvement Company executed and delivered to the Boston Safe Deposit & Trust Company a trust deed upon all the property, real and personal, then owned or thereafter to be acquired by the Improvement Company, to secure the payment of bonds issued by it. The Boston Safe Deposit & Trust Company, as trustee, was succeeded by William J. Rotch and Edward D. Mandell, as trustees, on November 8th, 1886. These trustees, on December 28th, 1886, instituted a suit in the Circuit Court of the United States for Oregon to foreclose the

trust deed. On April 11th, 1887, a decree was entered, directing the defendant, Oregon Southern Improvement Company, to pay the sum of \$1,516,666.66, and provided that if it did not, the property should be sold. Payment was not made and the property was sold to William J. Rotch and William Crapo for the reported price of \$120,000. On November 16th following, a deed was made conveying the property to Rotch and Crapo and about twenty days thereafter they conveyed it to the Southern Oregon Company. At the time this suit was instituted all the lands were unoccupied and unimproved except about 613 acres which were under lease or had been more or less improved by former tenants.

The deed from the Coos Bay Wagon Road Company to John Miller, conveying the 35,534 acres, specifically refers to the act of March 3rd, 1869, and copies its title. The deed from Miller to Huntington and others, conveying the same land specifically refers to the Miller deed. The deed from Huntington and others to Crocker specifically refers to the deeds to the Wagon Road Company to Miller and from Miller to Huntington. The deed from Crocker to Besse specifically refers to the deed from the Wagon Road Company to Miller. The deed from Besse specifically refers to the deed from the Coos Bay Wagon Road to Miller. The deed to the Oregon Southern Improvement Company specifically refers to the deed from the Wagon Road Company to Miller. The deed from the Coos Bay Wagon Road Company to Besse specifically re-



fers to the granting act of March 3rd, 1869, and the granting act of the Oregon Legislature on October 22nd, 1870. The deed of Besse to the Oregon Southern Improvement Company specifically refers to the Congressional Granting Act of March 3rd, 1869, and the Oregon Granting Act of October 22nd, 1870. All these instruments were duly recorded in the office of the Recorder of Deeds for the proper counties.

Cruises of the lands show that they contain 2,359,081,000 feet of lumber.

W. P. Metcalf, general manager of the Oregon Southern Improvement Company, on January 30th, 1886, wrote to Elijah Smith, president of the company, as follows:

“I have just returned from a trip over our land on the north and east forks of the Coquille, and find there a dozen settlers who have been on the road land for a period varying from one to twelve years. Farther east, there are many more. Most of them settled before the land was surveyed, only to find that they had got on the odd sections. Trusting to get title by purchase, they have improved the bottoms and made excellent farms. The old Wagon Road encouraged them by promising the land at \$2.50 per acre. They are all anxious to buy, but most of them have no money. I charged them \$10.00 per acre for the bottom land and \$3.00 per acre for the hill land, the former being fair value, being all cleared bottom, the latter rather high priced for the hill. I make them take even lots

and parts of sections, including both bottom and hill land."

On October 7th, 1886, B. W. Smith, treasurer of the Oregon Southern Improvement Company, wrote to the secretary as follows:

"Hon. C. A. Dolph, of Portland, Oregon, will take charge of the foreclosure of the Oregon & Southern Improvement Company mortgage. He may send to you for papers or information, which please furnish."

On the 17th of June, 1887, Elijah Smith, president of the Southern Oregon Improvement Company, wired to the said C. A. Dolph as follows:

"Loggie will bid for bondholders' committee, Rotch and Crapo not being trustees. Maximum bid is not over bonded debt."

It is stipulated that all debates in Congress as they appear in the official copies of the Congressional Globe and of the Congressional Record, and all Congressional committee reports, or other proceedings in Congress or before any Congressional committee having any bearing upon the questions involved in this suit, may be referred to and should have the same force and effect as if they had been introduced in evidence; but that it should not be necessary to copy the parts desired into the record of the case.

Charles R. Smith, called as a witness, testified substantially as follows:

That he was president of the defendant company and succeeded Elijah Smith about four years

before he gave his testimony. That he, his brother and sister, owned about 90% of the stock of the company, which was all acquired about the same time, about eight years before he gave his testimony. That he acted for his relatives in making the purchase, and that prior to doing so he had learned from Elijah Smith, who is not a relative of his and of whom he had never heard until six or seven years before, or a little before he bought his stock, that there was a technical flaw in the title to the land, but which he (Elijah Smith) thought could be cured by action on the part of the Attorney General of the United States.

Whereupon the defendant introduced in evidence the Judgment Roll of the Circuit Court of the United States for the District of Oregon, in the case of United States against Coos Bay Wagon Road Company and the Southern Oregon Company, being Exhibit 240, in words and figures as follows (omitting the formal parts):

To the Honorable Judges of the Circuit Court of the United States for the District of Oregon, sitting in equity:

The United States of America, by Judson Harmon, its attorney-general, brings this, its Bill of Complaint, against the Coos Bay Wagon Road Company, a corporation organized under and by virtue of the laws of the State of Oregon, and a citizen of said state and district, and the Southern Oregon Company, a corporation organized under and by virtue of the general laws of the State of

Oregon, and a citizen of said state and district, and complaining, says:

Par. I. That on the 3d day of March, 1869, the Congress of the United States passed an act granting to the State of Oregon, to aid in the construction of a Military Wagon Road from the navigable waters of Coos Bay to Roseburg, in the State of Oregon, the alternate sections of public land designated by odd numbers to the extent of three sections in width, on each side of said road, and said act provided for the right of indemnity for losses sustained within the original grant to the extent of six miles on either side of the line of said road, and said act further provided that the lands granted should not exceed three sections per mile for each mile of road actually constructed, and said act further provided that said grant should not embrace any mineral lands of the United States, or any lands to which homestead or pre-emption rights had attached, and that all lands reserved or appropriated should be reserved from the operation of the act.

Par. II. That your orator further shows unto your honors, that on the 22d day of October, 1870, the Legislative Assembly of the State of Oregon passed an act entitled "An Act donating certain lands to the Coos Bay Wagon Road Company," which act, after referring to the Act of Congress aforesaid, granted to the Coos Bay Wagon Road Company all lands, rights of way, rights, privileges and immunities granted or pledged to the State of



Oregon by said Act of Congress aforesaid, for the purpose of aiding said Coos Bay Wagon Road Company in constructing the road mentioned and described in said Act of Congress aforesaid, and upon the conditions and immunities therein prescribed.

Par. III. And your orator further shows to your honors, that on the 18th day of June, 1874, the Congress of the United States passed an act which, after reciting that certain lands had theretofore been granted by Acts of Congress to the State of Oregon to aid in the construction of certain military wagon roads in said state, and that there was no existing law providing for the issuing of formal patents for said land, provided as follows:

“That in all cases, when the road in aid of the construction of which said lands were granted, are shown by the certificate of the Governor of the State of Oregon as in said acts provided to have been constructed and completed, patents for said land shall issue in due form to the State of Oregon as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall, by public act, have transferred its interests in said land to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations, upon the payment of the necessary expenses thereof.”

Par. IV. And your orator further shows unto your honors that on the 19th day of September, 1872, the Governor of the State of Oregon made

and issued a certificate stating that the Coos Bay Wagon Road Company had constructed its road in accordance with the Act of Congress approved March 3, 1869, and with the Act of the Legislative Assembly of the State of Oregon approved October 22, 1870.

Par. V. And your orator further shows to your honors that on the 12th day of February, 1875, the President of the United States issued to the defendant, the Coos Bay Wagon Road Company, a patent for the following described land, among other lands, to-wit:

The Northeast quarter (NE.  $\frac{3}{4}$ ) of the Northeast quarter (NE.  $\frac{1}{4}$ ) of Section nine (9), Township twenty-eight (28) south, Range seven (7) west of the Willamette Meridian, in Douglas County, Oregon, said land lying within the primary three-mile limit of said grant to the Coos Bay Wagon Road Company.

Par. VI. And your orator further alleges that on the 22d day of January, 1863, James L. Miller, a duly qualified homestead entryman, duly made Homestead Entry Twenty-five on said Northeast quarter (NE.  $\frac{1}{4}$ ) of the Northeast quarter (NE.  $\frac{1}{4}$ ) of Section nine (9), Township twenty-eight (28) south, Range seven (7) west of the Willamette Meridian, which homestead entry remained uncanceled and was of full force and effect up to December 5, 1870, and that said land was not public land subject to grant to said Coos Bay Wagon Road Company on the 3d day of March, 1869, or on the

22d day of October, 1870, or at any time prior to December 5, 1870.

Par. VII. And your orator further avers that the ministerial officers of your orator acted erroneously and contrary to the law in issuing a patent for said land to said Coos Bay Wagon Road Company under the facts herein stated, and so your orator avers that said patent, insofar as the same purports to convey title to the land herein described, is null and void, and should be so declared.

Par. VIII. And your orator further shows unto your honors that it is informed and believes and so charges the fact to be that the Southern Oregon Company, defendant herein, claims to be the owner in fee simple of said Northeast quarter (NE.  $\frac{1}{4}$ ) of the Northeast quarter (NE.  $\frac{1}{4}$ ) of Section nine (9), Township twenty-eight (28) south, Range seven (7) west of the Willamette Meridian, its claim of title being as follows, viz., a deed to it through a chain of mesne conveyances from the patentee, that said Southern Oregon Company claims possession of said lands and the same, together with the improvements thereon, are of the value of \$1,600.

That said Southern Oregon Company claims title to said lands in fee simple, but your orator insists that the said Southern Oregon Company is chargeable with constructive notice of the several Acts of Congress of the United States pleaded herein, and of the laws in regard to the public lands of the United States, and the disposal thereof, and



that under the Acts of Congress and the laws relating to the disposal of public lands of the United States and the acts and doings of said Coos Bay Wagon Road Company, no title could pass to said Southern Oregon Company, and that said patent should be cancelled as to it, as well as to the grantee therein, the Coos Bay Wagon Road Company.

For as much, therefore, as your orator is without adequate remedy in a court of law, and to the end that the said defendant companies may, if they can, show why your orator should not have the relief herein prayed, and the matters herein may be determined according to equity and good conscience, your orator brings this suit, and prays that the patent purporting to convey title to said above described lands may be set aside, cancelled and decreed null and void; and that said several mesne conveyances from said Coos Bay Wagon Road Company to the Southern Oregon Company may also be set aside, cancelled and declared null and void, and your orator prays all other and proper relief in the premises.

And may it please your honors to grant unto your orator the writ of subpoena issuing out of and under the seal of this court, directed to the defendants, commanding the defendants on a certain day, and under a certain penalty therein to be specified, personally to be and appear in this court and then and there to answer, but not under oath (an answer under oath being hereby expressly



waived), and to abide such order and decree as to your honors may seem proper.

JUDSON HARMON,  
Attorney General of the United States.

DANIEL R. MURPHY,  
United States Attorney for Oregon.

Filed February 18, 1896.

DEMURRER.

The demurrer of the above-named defendant, the Southern Oregon Company, to the Bill of Complaint of the above-named plaintiff:

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said Complainant's Bill contained to be true, in such manner and form as the same are therein set forth, doth demur thereto, and for cause of demurrer sheweth:

I.

That said complainant hath not in and by said Bill made or stated such a cause as doth or should entitle it to any relief as is hereby sought and prayed for from or against this defendant.

II.

That it appeareth by the complainant's own showing in the said Bill that the complainant is not entitled to the relief prayed for by the Bill against this defendant.

III.

That it appeareth by said Bill of Complaint

that the complainant is without equity in the premises, and is not entitled to any relief.

IV.

That said Bill of Complaint doth not contain any matter of equity wherein this court may grant any decree, or give to the complainant any relief against this defendant.

V.

That it appeareth by said Bill of Complaint that the complainant hath no interest in the subject-matter of this suit, nor in the relief prayed for therein.

VI.

That it doth not appear and is not shown by said Bill of Complaint that this defendant is not a purchaser in good faith, and for a valuable consideration, of all the lands described therein.

VII.

That it doth not appear by said Bill of Complaint that the complainant is without a full, speedy, adequate and complete remedy at law, or that its alleged cause of suit is within the jurisdiction of a court of equity.

Wherefore, and for divers other defects and causes of demurrer appearing in said complainant's said Bill, this defendant doth demur thereto, and humbly demands the judgment of this honorable court, whether he shall be compelled to make any answer to the said Bill; and prays to be hence dis-

missed, with its reasonable costs in this behalf most wrongfully sustained.

JOHN A. GRAY,  
Solicitor for Defendant.

### ORDER OF COURT.

“Now, at this day, comes the plaintiff, by Mr. Daniel R. Murphy, United States Attorney, and the defendants, by Mr. E. B. Watson, of counsel, and thereupon this cause comes on to be heard upon the Demurrer to the Bill of Complaint herein, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged that said Demurrer be, and it is hereby, sustained.”

January 12, 1897.

### DECREE.

“Now at this day comes the plaintiff herein, by Mr. Charles J. Schnabel, Assistant United States Attorney, and the defendants herein, by Mr. B. B. Beekman, and it appearing that the Demurrer to the Bill of Complaint herein has been sustained, and, on motion of said defendants, it is ordered, adjudged and decreed that said Bill of Complaint be, and the same is hereby, dismissed.”

Whereupon defendant introduced in evidence the judgment roll in the case of the United States against the Coos Bay Wagon Road Company, the Southern Oregon Company, T. R. Sheridan, J. P. Sheridan, R. S. Sheridan, Margaret Briggs, Helen M. Rook and Mary A. Rook, in the Circuit Court

of the United States for the District of Oregon, being Exhibit No. 241, which, omitting formal parts, is in words and figures as follows:

To the Honorable Judges of the Circuit Court of the United States for the District of Oregon, sitting in equity:

The United States of America, by Judson Harmon, its Attorney General, brings this, its Bill of Complaint as against the above-named defendants, and complaining, says:

Par. I. That during all the times hereinafter mentioned, the Coos Bay Wagon Road Company was a corporation duly incorporated under and by virtue of the general laws of the State of Oregon.

Par. II. And your orator would further show unto your honors that during all the times hereinafter mentioned the Southern Oregon Company was a corporation duly incorporated under and by virtue of the general laws of the State of Oregon.

Par. III. That on the 3d day of March, 1869, the Congress of the United States passed an act granting to the State of Oregon, to aid in the construction of a Military Wagon Road Company, from the navigable waters of Coos Bay to Roseburg, in the State of Oregon, the alternate sections of public land designated by odd numbers to the extent of three sections in width on each side of said road; and said act provided for the right of indemnity for losses sustained within the original grant to the extent of six miles on either side of the line



of said road. And said act further provided that the lands granted should not exceed three sections per mile for each mile of road actually constructed. And said act further provided that said grant should not embrace any mineral lands of the United States or any lands to which homestead or pre-emption rights had attached; and that all lands reserved or appropriated should be reserved from the provision of the act.

Par. IV. And your orator further shows unto your honors that on the 22d day of October, 1870, the Legislative Assembly of the State of Oregon passed an act entitled "An Act donating certain lands to the Coos Bay Wagon Road Company," which act, after referring to the Act of Congress aforesaid, granted to the Coos Bay Wagon Road Company all lands, rights of way, rights, privileges and immunities granted or pledged to the State of Oregon by said Act of Congress aforesaid, for the purpose of aiding said Coos Bay Wagon Road Company in constructing the road mentioned and described in said Act of Congress aforesaid, and upon the conditions and immunities therein prescribed.

Par. V. And your orator further shows to your honors that on the 18th day of June, 1874, the Congress of the United States passed an act, which after reciting that certain lands had theretofore been granted by Acts of Congress to the State of Oregon, to aid in the construction of certain Mili-

tary Wagon Roads in said state, and that there was no existing law providing for the issuing of formal patents for said lands, provided as follows:

“That in all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the Governor of the State of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon as fast as the same shall under said grants be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said land to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof.”

Par. VI. And your orator further shows unto your honors that on the 19th day of September, 1872, the Governor of the State of Oregon made and issued a certificate stating that the Coos Bay Wagon Road Company had constructed its road in accordance with the Act of Congress approved March 3, 1869, and with the Act of the Legislative Assembly of the State of Oregon, approved October 22, 1870.

Par. VII. And your orator further shows to your honors that on the 15th day of February, 1877, the President of the United States issued to the

defendant, the Coos Bay Wagon Road Company, a patent for the following described lands, to-wit:

The Southeast quarter of the Northwest quarter of Section 1; Lots 1, 2, 3 and 4, and the South half of the North half and the South half of Section 3; Lots 1, 2, 3 and 4, and the South half of the North half and the South half of Section 5; Lots 1, 2, 3 and 4, and East half of the West half, and the East half of Section 7, all of Section 9; all of Section 17; Lots 1, 2, 3 and 4, and East half of the West half and the East half of Section 19; all of Section 21; all of Section 29, in Township 28 south, Range 8 west of Willamette Meridian. The Northeast quarter, the Northwest quarter and the Southwest quarter of Section 1; Lots 1, 2, 3 and 4, the South half of the North half and the South half of Section 3; Lots 1, 2, 3 and 4, the South half of the North half and the South half of Section 5; Lots 1, 2, 3, 4, the East half of the West half and the East half of Section 7, all of Section 9, in Township 29 south, Range 9 West, Willamette Meridian. Lots 1, 2, 3, 4, the South half and the South half of the North half of Section 1; Lots 1, 2, 3, 4, the South half and the South half of the North half of Section 3; Lots 1, 2, 3, 4, the South half and the South half of the North half of Section 5; Lots 1, 2, 3, 4, the East half of the West half, and the East half of Section 7; all of Sections 9, 11, 13, 15 and 17; Lots 1, 2, 3, 4, the East half of the West half, and the East half of Section 19; all of Sections 21, 23, 25, 27 and 29; Lots 1, 2, 3, 4, the East

half of the West half and the East half of Section 31; all of Sections 33 and 35, in Township 28 south, of Range 9 West, of Willamette Meridian.

Par. VIII. And your orator further shows to your honors that on the 3d day of October, 1874, the President of the United States issued to the defendant, the Coos Bay Wagon Road Company, a patent for the following described lands, to-wit:

The West half of the Northeast quarter, the Northwest quarter and the Southeast quarter of Section 11; the East half of the Northeast quarter, the Southwest quarter of the Northeast quarter, the Southeast quarter of the Northwest quarter, the Southeast quarter, the Southwest quarter of the Southwest quarter, and the East half of the Southwest quarter of Section 13; Lots 2 and 3, the Northwest quarter of the Northeast quarter, the North half of the Northwest quarter, the Southwest quarter of the Northwest quarter, and the East half of the Southwest quarter of Section 15; Lot 4 and the Southeast quarter of the Southeast quarter, the West half of the Southeast quarter, and the Southwest quarter of Section 23; the Northwest quarter and the Northwest quarter of the Southwest quarter of Section 25; all of Section 27; the North half of the Northeast quarter, the Northwest quarter, the Southwest quarter and the South half of the Southeast quarter of Section 31; the Northeast quarter, the Northwest quarter, the North half of the Southwest quarter, the Southeast quarter and the South half of the Southwest quarter of



Section 33; the West half of the Northwest quarter, the Northeast quarter, the East half of the Northwest quarter, the North half of the Southeast quarter, and the Northeast quarter of the Southwest quarter of Section 35, all in Township 28 South, Range 8 West, Willamette Meridian. The Northeast quarter, the Northwest quarter, and the Southwest quarter of Section 1; the South half of the Northeast quarter, the Southeast quarter and the West half of Section 11, all in Township 29 South, of Range 9 West, Willamette Meridian. And Lots 1, 2, 3, 7, 8 and 9, the North half of the Northeast quarter, and the Northeast quarter of the Northwest quarter of Section 1; the Northeast quarter, the Northwest quarter and the South half of Section 3; the Northeast quarter, the Northwest quarter and the South half of Section 5; the Northeast quarter of the Northeast quarter, and the Northwest quarter of Section 7; all of Section 9; the East half of the Northeast quarter, the Southwest quarter of the Northeast quarter, the Northwest quarter, the South half of Section 11; the North half of Section 15; Lot 3 and the Northeast quarter of the Northeast quarter of Section 17, all in Township 29 South, of Range 8 West, of Willamette Meridian. Lots 1, 2 and 3, the Southwest quarter of the Northeast quarter, the South half of the Northwest quarter, the Northwest quarter of the Southeast quarter, and the Southwest quarter of Section 7, Township 29 South, of Range 7 West, Willamette Meridian. The fractional Northeast

quarter of the Northeast quarter, and the fractional Northwest quarter of the Northeast quarter of Section 3; Lot 10 in Section 7; the Northwest quarter of Section 9; the Southeast quarter of the Southwest quarter, and the South half of the Southeast quarter of Section 23, all in Township 28 South, of Range 6 West, of Willamette Meridian. The East half of the Northeast quarter, the West half of the Northeast quarter, the Northwest quarter, the East half of the Southeast quarter, and the Northwest quarter of the Southwest quarter of Section 5; the Northwest quarter of the Northeast quarter, the East half of the Northwest quarter, the West half of the Northwest quarter, the East half and Southwest quarter of the Southeast quarter, and the Southeast quarter of the Southwest quarter of Section 7; the Northeast quarter of the Northeast quarter, the Southwest quarter of the Northeast quarter, the Northwest quarter of the Northwest quarter, the Southeast quarter of the Southeast quarter, the West half of the Southeast quarter, and the South half of the Southwest quarter of Section 9; the Southwest quarter of the Southeast quarter of Section 11; the South half of the Northwest quarter, the North half of the Southwest quarter, and the Southwest quarter of the Southwest quarter of Section 13; Lots 1, 2, 3, 4, 5 and 6, the Southwest quarter of the Southeast quarter, and the South half of the Southwest quarter of Section 15; the Southwest quarter of the Northeast quarter, and the Southwest quarter of

Section 17; the Northeast quarter, the Northwest quarter, the Southeast quarter and the Southwest quarter of Section 19; the Northeast quarter, the Northwest quarter, the North half of the Southeast quarter, the Northeast quarter of the Southwest quarter, and the West half of the Southwest quarter of Section 21; Lots 1, 2, 3, 4, 5, 6, 7, 8 and 10, and the West half of the Northeast quarter, and the Northwest quarter of Section 23; the West half of the Northwest quarter of Section 25; Lots 3 and 4 of Section 27; Lots 1, 5, 6, 7, 8, 9 and 10, and the North half of the Northwest quarter of Section 29; Lot 3 in Section 31; Lots 1 and 2 in Section 33; the Southeast quarter and the East half of the Southwest quarter of Section 35, all in Township 28 South, of Range 7 West, of Willamette Meridian.

Par. IX. That the Congress of the United States by an act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon, approved July 25, 1866," authorized such company organized under the laws of Oregon as the Legislature of said state should thereafter designate, to construct a railroad and telegraph line within the State of Oregon, beginning at the City of Portland, and running thence through the Willamette, Umpqua and Rogue River Valleys to the southern boundary of Oregon, there to connect with another railroad authorized in said act to be built in the State of California, and granted to said Oregon company every alternate



section of public land not mineral designated by odd numbers, to the amount of twenty alternate sections per mile, ten on each side of said railroad, and whenever any of said alternate sections or parts of sections should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands designated as aforesaid should be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, designated by odd numbers as aforesaid, nearest to, and not more than ten miles beyond the limits of said first-named alternate sections, and as soon as the said company should file in the office of the Secretary of the Interior a map of survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior should withdraw from sale public lands therein granted on each side of said railroad, so far as located and within the limits therein specified, and your orator shows that by a joint resolution adopted October 20, 1868, of the Legislature of the State of Oregon, the Oregon Central Railroad Company was designated in accordance with said last-mentioned Act of Congress as capable of receiving and undertaking the privileges, franchises, grants and duties above set forth, and did become the corporation entitled to all the benefits and subject to all the obligations of said Act of Congress, and that on or about April 4, 1870, the said Oregon and California Rail-



road Company, a corporation duly organized under the laws of Oregon, became the successor and assign of said Oregon Central Railroad Company.

Par. X. And your orator would further show unto your honors that on the 26th day of March, 1870, the officers of the Oregon and California Railroad Company definitely fixed the line of said railroad authorized by said Act of Congress, and filed a plat thereof in the office of the Commissioner of the General Land Office, and presented the same to the then Secretary of the Interior, showing, among other things, a route along the line authorized by said Act of Congress approved July 25, 1866, and the Secretary of the Interior did, on said 26th day of March, 1870, in due form, accept said map, and that all of the lands hereinbefore described are within the place limits of the grant prescribed in said Act of July 25, 1866. And your orator shows that the entire line of the railroad of the said Oregon and California Railroad Company has been fully constructed and been duly accepted by the President of the United States, and has been continuously and still is operated by said company.

Par. XI. And your orator further avers that the ministerial officers of your orator acted erroneously and contrary to the law in issuing patents for said lands to said Coos Bay Wagon Road Company under the facts herein stated, and so your orator avers that said patents, in so far as the same

purport to convey title to the lands herein described, are null and void and should be so declared.

Par. XII. And your orator further shows unto your honors that it is informed and believes and so charges the fact to be that T. R. Sheridan, J. P. Sheridan and R. S. Sheridan, defendants herein, claim to be the owners in fee simple of the Southwest quarter of the Northwest quarter, and Lot 3 in Section 15, Township 28 South, Range 8 West, of the Willamette Meridian, their claim of title being as follows, viz., a deed to them through a chain of mesne conveyance from the patentee. That said defendants claim possession of said lands, and the same, together with the improvements thereon, are of the value of \$2,500.

That said defendants claim title to said lands in fee simple, but your orator insists that said defendants are chargeable with constructive notice of the several Acts of Congress of the United States pleaded herein, and of the laws in regard to the public lands of the United States and the disposal thereof, and that under the Acts of Congress and the laws relating to the disposal of public lands of the United States and the acts and doings of said Coos Bay Wagon Road Company, no title could pass to said T. R. Sheridan, J. P. Sheridan and R. S. Sheridan, and that said patents should be cancelled as to them as well as to the grantee therein, the Coos Bay Wagon Road Company.

Par. XIII. And your orator further shows unto your honors that it is informed and believes and

so charges the fact to be that Margaret Briggs, defendant herein, claims to be the owner in fee simple of the East half of the Southwest quarter of Section 21, Township 28 South, Range 8 West, of Willamette Meridian, her claim of title being as follows, viz., a deed to her through a chain of mesne conveyances from the patentee. That said Margaret Briggs claims possession of said lands, and the same, together with the improvements thereon, are of the value of \$3,800.

That said Margaret Briggs claims title to said lands in fee simple, but your orator insists that said Margaret Briggs is chargeable with constructive notice of the several Acts of Congress of the United States pleaded herein, and the laws in regard to the public lands of the United States and the disposal thereof, and that under the Acts of Congress and the laws relating to the disposal of public lands of the United States and the acts and doings of said Coos Bay Wagon Road Company, no title could pass to said Margaret Briggs, and that said patent should be cancelled as to her, as well as to the grantee therein, the Coos Bay Wagon Road Company.

Par. XIV. And your orator further shows unto your honors that it is informed and believes and so charges the fact to be that Helen M. Rook, the defendant herein, claims to be the owner in fee simple of the East half of the Southeast quarter of Section 21, Township 28 South, Range 8 West, of Willamette Meridian, her claim of title being



as follows, viz., a deed to her through a chain of mesne conveyances from the patentee. That said Helen M. Rook claims possession of said lands, and the same, together with the improvements thereon, are of the value of \$2,400.

That said Helen M. Rook claims title to said lands in fee simple, but your orator insists that said Helen M. Rook is chargeable with constructive notice of the several Acts of Congress of the United States pleaded herein, and of the laws in regard to public lands of the United States and the disposal thereof, and that under the Acts of Congress and the laws relating to the disposal of public lands of the United States and the acts and doings of said Coos Bay Wagon Road Company no title could pass to said Helen M. Rook, and that said patent should be cancelled as to her, as well as to the grantee therein, the Coos Bay Wagon Road Company.

Par. XV. And your orator further shows unto your honors that it is informed and believes and so charges the fact to be that Mary A. Rook, defendant herein, claims to be the owner in fee simple of the West half of the Southeast quarter of Section 21, Township 28 South, of Range 8 West, of Willamette Meridian, her claim of title being as follows, viz., a deed to her through a chain of mesne conveyances from the patentee. That said Mary A. Rook claims possession of said lands, and the same, together with the improvements thereon, are of the value of \$2,500.



That said Mary A. Rook claims title to said lands in fee simple, but your orator insists that said Mary A. Rook is chargeable with constructive notice of the several Acts of Congress of the United States pleaded herein, and of the laws in regard to the public lands of the United States and the disposal thereof, and that under the Acts of Congress and the laws relating to the disposal of public lands of the United States and the acts and doings of said Coos Bay Wagon Road Company no title could pass to said Mary A. Rook, and that said patent should be cancelled as to her, as well as to the grantee therein, the Coos Bay Wagon Road Company.

Par. XVI. And your orator further shows unto your honors that it is informed and believes and so charges the fact to be that the Southern Oregon Company, defendant herein, claims to be the owner in fee simple of all the lands described herein, except those lands hereinbefore mentioned as being claimed by T. R. Sheridan, J. P. Sheridan, R. S. Sheridan, Margaret Briggs, Helen M. Rook and Mary A. Rook, its claim of title being as follows, viz., a deed to it through a chain of mesne conveyances from the patentee. That said Southern Oregon Company claims possession of said lands, and the same, together with the improvements thereon, are of the value of \$600,000.

That said Southern Oregon Company claims title to said lands in fee simple, but your orator insists that said Southern Oregon Company is charge-

able with constructive notice of the several Acts of Congress of the United States pleaded herein, and of the laws in regard to the public lands of the United States and the disposal thereof, and that under the Acts of Congress and the laws relating to the disposal of public lands of the United States, and the acts and doings of the said Coos Bay Wagon Road Company, no title could pass to said Southern Oregon Company, and that said patent should be cancelled as to it, as well as to the grantee therein, the Coos Bay Wagon Road Company.

For as much, therefore, as your orator is without adequate remedy in a court of law, and to the end that the said defendants may, if they can, show why your orator should not have the relief herein prayed, and the matters herein may be determined according to equity and good conscience, your orator brings this suit, and prays that the patent purporting to convey title to said above described lands may be set aside, cancelled and declared null and void, and that said several mesne conveyances from said Coos Bay Wagon Road Company to the said defendants herein may be set aside, cancelled and declared null and void, and your orator prays all other and proper relief in the premises.

And may it please your honors to grant unto your orator the writ of subpoena issuing out of and under the seal of this court, directed to the defendants, commanding the defendants on a certain day, and under a certain penalty therein to be

specified, personally to be and appear in this court and then and there to answer, but not under oath (answer under oath being hereby expressly waived) and to abide such order and decree as to your honors may seem proper.

JUDSON HARMON,  
Attorney General of the United States.

DANIEL R. MURPHY,  
United States Attorney for Oregon.

Filed February 29, 1896.

### DEMURRER

Of Coos Bay Wagon Road Company and the Southern Oregon Company, Filed May 25, 1896.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said Complainant's Bill contained to be true, in such manner and form as the same are therein set forth, doth demur thereto, and for cause of demurrer, sheweth:

#### I.

That said complainant hath not in and by said Bill made or stated such a cause as doth or should entitle it to any relief as is thereby sought and prayed for, from or against this defendant.

#### II.

That it appeareth by the complainant's own showing in the said Bill that the complainant is not entitled to the relief prayed for by the Bill against this defendant.

III.

That it appeareth by said Bill of Complaint that the complainant is without equity in the premises, and is not entitled to any relief.

IV.

That said Bill of Complaint doth not contain any matter of equity wherein this court can grant any decree, or give to the complainant any relief against this defendant.

V.

That it appeareth by said Bill of Complaint that the complainant hath no interest in the subject-matter of this suit, nor in the relief prayed for therein.

VI.

That it doth not appear and is not shown by said Bill of Complaint that this defendant is not a purchaser in good faith, and for a valuable consideration of all the lands described therein.

VII.

That it doth not appear and is not shown by said Bill of Complaint that the several defendants alleged to be grantees of the Coos Bay Wagon Road, or of portions of the land alleged to have been patented to that company are not bona fide purchasers of the lands alleged in said Bill to be in their possession and to be claimed by them under conveyances from said company.

VIII.

That it doth not appear by said Bill of Com-



plaint that the complainant is without a full, speedy, adequate and complete remedy at law, or that its alleged cause of suit is within the jurisdiction of a court of equity.

Wherefore, and for divers other defects and causes of demurrer appearing in the said complainant's said Bill, this defendant doth demur thereto, and humbly demands the judgment of this honorable court whether he shall be compelled to make any answer to the said Bill; and prays to be hence dismissed, with its reasonable costs in this behalf most wrongfully sustained.

JAMES F. WATSON,

JOHN A. GRAY,

B. B. BEEKMAN,

E. B. WATSON,

Solicitors for Defendants.

ORDER SUSTAINING DEMURRER,

January 12, 1897.

Now, at this day, comes the plaintiff, by Mr. Daniel R. Murphy, United States Attorney, and the defendants, by Mr. E. B. Watson, of counsel, and thereupon this cause comes on to be heard upon the Demurrer to the Bill of Complaint herein, was argued by counsel. On consideration whereof, it is now here ordered and adjudged that said Demurrer be, and it is hereby, sustained.

ORDER DISMISSING COMPLAINT,

June 12, 1897.

Now, at this day, comes the plaintiff herein, by Mr. Charles J. Schnabel, Assistant United States Attorney, and the defendants, by Mr. B. B. Beekman, of counsel, and it appearing to the court that the Demurrers of said defendants to the Bill of Complaint herein have been sustained by the court, on motion of said defendants, it is ordered, adjudged and decreed that said Bill of Complaint herein be, and the same is, hereby dismissed.

It was stipulated that Judge Bellinger, who sustained the Demurrer in the above case, and Mr. Daniel R. Murphy, United States Attorney at that time, are both dead. That the reasons of the judge announced at the time of the decision for sustaining said Demurrer do not appear upon the record of the court.

Whereupon, the complainant offered in evidence a letter written by Mr. Daniel R. Murphy, United States Attorney for Oregon, to the Attorney General of the United States, in words and figures as follows:

“Portland, May 21, 1897.

Hon. Joseph McKenna, Attorney General,  
Washington, D. C.

Sir: In case No. 2284, the United States vs. the Coos Bay Wagon Road Company and others, seeking the cancellation of a patent to 30,044 46-100 acres of land heretofore patented to the Coos Bay Wagon Road Company, which said lands were

within a prior and controlling grant, viz., the grant to the Oregon and California Railroad Company, I have at this time to inform you that a Demurrer was filed by the defendants to the Bill of Complaint. The Demurrer has been argued, and the court has sustained the same, holding that the United States were in no wise interested in this matter, that the real party in interest was the Oregon and California Railroad Company, the prior grantee, and that the suit should be brought in the name of the Oregon and California Railroad Company; that the Government, if it were successful in the present litigation, could gain nothing thereby, and the lands patented to the Coos Bay Wagon Road Company would, by the terms of the grant to the Oregon and California Railroad Company, immediately go to said latter company in case the Government was successful in this litigation.

Should I proceed further with this case, or am I to accept the decision of Judge Bellinger as conclusive in this litigation? A copy of the Bill in this cause was furnished to the Department of Justice at the time the Bill was filed.

Respectfully yours,

DANIEL R. MURPHY,  
U. S. Attorney."

Whereupon the defendant offered in evidence the judgment roll in the case of the United State of America against the Coos Bay Wagon Road Com-

pany and the Southern Oregon Company, Lorenz Vogl, John Vogl, Mathias Vogl, W. S. Hamilton, Mary Mark, Charlotte H. Elliott, Frederick Elliott, John Weaver, John Norman and C. C. Bonebrake, in the Circuit Court of the United States for the District of Oregon, being Defendant's Exhibit No. 242, and, omitting formal parts, is in words and figures as follows :

BILL OF COMPLAINT,

Filed February 29, 1896.

To the Honorable Judges of the Circuit Court of the United States for the District of Oregon, sitting in equity :

The United States of America, by Judson Harmon, its Attorney General, brings this, its Bill of Complaint, as against the above-named defendants, and complaining, says :

Par. I. That during all the times hereinafter mentioned the Coos Bay Wagon Road Company was a corporation duly incorporated under and by virtue of the general laws of the State of Oregon.

Par. II. And your orator further shows unto your honors that during all the times hereinafter mentioned the Southern Oregon Company was a corporation duly incorporated under and by virtue of the general laws of the State of Oregon.

Par. III. That on the 3d day of March, 1869, the Congress of the United States passed an act granting to the State of Oregon, to aid in the con-



struction of a Military Wagon Road from the navigable waters of Coos Bay to Roseburg, in the State of Oregon, the alternate sections of public land designated by odd numbers to the extent of three sections in width, on each side of said road, and said act provided for the right of indemnity for losses sustained within the original grant to the extent of six miles on either side of the line of said road, and said act further provided that the lands granted should not exceed three sections per mile for each mile of road actually constructed, and said act further provided that said grant should not embrace any mineral lands of the United States, or any lands to which homestead or pre-emption rights had attached, and that all lands reserved or appropriated should be reserved from the operation of the act.

Par. IV. And your orator further shows unto your honors that on the 22d day of October, 1870, the Legislative Assembly of the State of Oregon passed an act entitled "An Act donating certain lands to the Coos Bay Wagon Road Company," which act, after referring to the Act of Congress aforesaid, granted to the Coos Bay Wagon Road Company all lands, rights of way, rights, privileges and immunities granted or pledged to the State of Oregon by said Act of Congress aforesaid, for the purpose of aiding said Coos Bay Wagon Road Company in constructing the road mentioned and described in said Act of Congress aforesaid, and upon the conditions and immunities therein prescribed.

Par. V. And your orator further shows to your honors that on the 18th day of June, 1874, the Congress of the United States passed an act which, after reciting that certain lands had theretofore been granted by Acts of Congress to the State of Oregon to aid in the construction of certain Military Wagon Roads in said state, and that there was no existing law providing for the issuing of formal patents for said lands, provided as follows:

“That in all cases when the roads, in aid of the construction of which said lands were granted, are shown by the certificate of the Governor of the State of Oregon as in said acts provided to have been constructed and completed, patents for said land, shall issue in due form, to the State of Oregon, as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall, by public act, have transferred its interests in said land to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations, upon the payment of the necessary expenses thereof.”

Par. VI. And your orator further shows unto your honors that on the 19th day of September, 1872, the Governor of the State of Oregon made and issued a certificate stating that the Coos Bay Wagon Road Company had constructed its road in accordance with the Act of Congress approved March 3, 1869, and with the Act of the Legislative

Assembly of the State of Oregon approved October 22, 1870.

Par. VII. And your orator would further show unto your honors that on the 26th day of March, 1873, there was certified to said Coos Bay Wagon Road Company the Northwest quarter of the Southwest quarter of Section 25, Township 27 South, Range 12 West, of the Willamette Meridian.

Par. VIII. And your orator would further show unto your honors that on the 26th day of March, 1873, the President of the United States issued to the defendant, the Coos Bay Wagon Road Company, a patent for the following described lands, to-wit:

The Southeast quarter of the Southeast quarter of Section 19; the North half of the Northeast quarter, the North half of the Northwest quarter, the Southeast quarter of the Northwest quarter, and the Southwest quarter of the Northeast quarter of Section 29, and the West half of the Northwest quarter of Section 33, all in Township 25 South, Range 12 West, of the Willamette Meridian. And the West half of the Northwest quarter and the Northwest quarter of the Southwest quarter of Section 5, and the Northwest quarter of the Northeast quarter, and the North half of the Northwest quarter, the Southwest quarter of the Northwest quarter, and the Northwest quarter of the Southwest quarter of Section 7, all in Township 26 South, of Range 12 West, of the Willamette Meridian.

Par. IX. And your orator would further show unto your honors that on the 12th day of February, 1875, the President of the United States issued to the defendant, the Coos Bay Wagon Road Company, a patent for the following described lands, to-wit:

The Northwest quarter, the West half of the Northeast quarter, the Northwest quarter of the Southwest quarter, and Lot 1 in Section 13, and the West half of the Southeast quarter, and the Southeast quarter of the Southeast quarter of Section 1, all in Township 26 South, of Range 13 West, of the Willamette Meridian.

Par. X. And your orator would further show unto your honors that on the .. day of January, 1869, Samuel C. Braden, a duly qualified homestead entryman under the laws of the United States of America, settled upon the Northwest quarter of the Southwest quarter of Section 25, Township 27 South, Range 12 West, of the Willamette Meridian, with the intention of homesteading the same, and ever since said .. day of January, 1869, has continued to reside upon said land, and to cultivate and improve the same, and on the .. day of ....., 189.., and within ninety days from the date of the filing of the township plat of the survey of said lands in the District Land Office at Roseburg, Oregon, the said Samuel C. Braden in good faith made application for filing a homestead covering said Northwest quarter of the Southwest quarter of said Section 25, Township 27 South,



Range 12 West, of the Willamette Meridian, at the Roseburg Land Office in the State and District of Oregon.

Par. XI. And your orator would further show unto your honors that the following described lands, to-wit: Southeast quarter of Southeast quarter, in Section 19, Township 25 South, Range 12 West, 40 acres; the North half of the Northeast quarter, the North half of the Northwest quarter, Southeast quarter, Northwest quarter and Southwest quarter Northeast quarter, in Section 29, Township 25 South, Range 12 West, 240 acres; the West half of the Northwest quarter of Section 33, Township 25 South, Range 12 West, 80 acres; the West half, Northwest quarter and Northwest quarter of Southwest quarter, Section 5, Township 26 South, Range 12 West, 113.31 acres; the Northwest quarter Northeast quarter, North half Northwest quarter, Southwest quarter Northwest quarter, and Northwest quarter Southwest quarter, Section 7, Township 26 South, Range 12 West, 196.70 acres; the Northwest quarter, the West half Northeast quarter, Northwest quarter Southwest quarter, and Lot 1, Section 13, Township 26 South, Range 13 west, 309.58 acres; the West half Southeast quarter, and Southeast quarter Southeast quarter, Section 1, Township 26 South, Range 13 West, 130 acres, containing in all 1,099.59 acres, lie entirely without the limits of the grant to the said State of Oregon, subsequently granted to the defendant, the Coos Bay Wagon Road Company, by the said

State of Oregon by the Act of its Legislative Assembly as aforesaid.

Par. XII. And your orator would further show unto your honors that the Congress of the United States, by an act entitled "An Act to confirm pre-emption and homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the Land Department," approved April 21, 1876, provided, among other things: "That all pre-emption and homestead entries or entries in compliance with any law of the United States of public lands made in good faith by settlers upon tracts of land not more than one hundred and sixty acres within the limits of any land grant prior to the time when notice of the withdrawal of the lands embraced in such grant, as received at the local land office of the district in which such lands were situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead laws have been complied with and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed and patents for the same shall issue to the parties entitled thereto."

Par. XIII. And your orator further avers that the ministerial officers of your orator acted erroneously and contrary to the law in issuing a patent for said lands to said Coos Bay Wagon Road Company under the facts herein stated, and so your orator avers that said patent, in so far as

the same purports to convey title to the lands herein described, is null and void, and should be so declared.

Par. XIV. And your orator further shows unto your honors that it is informed and believes and so charges the fact to be that Lorenz Vogl, John Vogl and Mathias Vogl, defendants herein, claim to be the owners in fee simple of the West half of the Northwest quarter of Section 33, Township 25 South, of Range 12 West, of the Willamette Meridian, their claim of title being as follows, viz., a deed to them through a chain of mesne conveyances from the patentee. That said Lorenz, John and Mathias Vogl claim possession of said lands, and the same, together with the improvements thereon, are of the value of \$2,400.

That said Lorenz, John and Mathias Vogl claim title to said lands in fee simple, but your orator insists that the said Lorenz, John and Mathias Vogl are chargeable with constructive notice of the several Acts of Congress of the United States pleaded herein, and of the laws in regard to public lands of the United States, and the disposal thereof, and that under the Acts of Congress and the laws relating to the disposal of public lands of the United States and the acts and doings of said Coos Bay Wagon Road Company no title could pass to said Lorenz, John and Mathias Vogl, and that said patents should be cancelled as to them, as well as to the grantees therein, the Coos Bay Wagon Road Company.

Par. XV. And your orator further shows unto your honors that it is informed and believes and so charges the fact to be that W. S. Hamilton, defendant herein, claims to be the owner in fee simple of Lot 4, Section 5, Township 26 South, Range 12 West, of Willamette Meridian, being a part of the West half of the Northwest quarter of said section, his claim of title being as follows, viz., a deed to him through a chain of mesne conveyances from the patentee. That said W. S. Hamilton claims possession of said lands, and the same, together with the improvements thereon, are of the value of \$3,000.

That said W. S. Hamilton claims title to said lands in fee simple, but your orator insists that the said W. S. Hamilton is chargeable with constructive notice of the several Acts of Congress of the United States pleaded herein, and of the laws in regard to public lands of the United States, and the disposal thereof, and that under the Acts of Congress and the laws relating to the disposal of public lands of the United States and the acts and doings of said Coos Bay Wagon Road Company, no title could pass to said W. S. Hamilton, and that said patent should be cancelled as to him, as well as to the grantee therein, the Coos Bay Wagon Road Company.

Par. XVI. And your orator further shows unto your honors that it is informed and believes and so charges the fact to be that Mary Mark, defendant herein, claims to be the owner in fee simple



of the Northwest quarter of the Northwest quarter of Section 7, Township 26 South, Range 12 West, of the Willamette Meridian, her claim of title being as follows, viz., a deed to her through a chain of mesne conveyances from the patentee. That said Mary Mark claims possession of said lands, and the same, together with the improvements thereon, are of the value of \$1,250.

That said Mary Mark claims title to said lands in fee simple, but your orator insists that said Mary Mark is chargeable with constructive notice of the several Acts of Congress of the United States pleaded herein, and of the laws in regard to the public lands of the United States, and the disposal thereof, and that under the Acts of Congress and the laws relating to the disposal of public lands of the United States and the acts and doings of said Coos Bay Wagon Road Company no title could pass to said Mary Mark, and that said patent should be cancelled as to her, as well as to the grantee therein, the Coos Bay Wagon Road Company.

Par. XVII. And your orator further shows unto your honors that it is informed and believes and so charges the fact to be that Charlotte H. Elliott and Frederick Elliott, defendants herein, claim to be the owners in fee simple of the Northwest quarter of Section 13, Township 26 South, of Range 13 West, also the Northwest quarter of the Southwest quarter, and Lot 1, Section 13, Township 26 South, Range 13 West, of the Willamette Meridian, their

claim of title being as follows, viz., a deed to them through a chain of mesne conveyances from the patentee. That said Charlotte H. Elliott and Frederick Elliott claim possession of said lands, and the same, together with the improvements thereon, are of the value of \$8,000.

That said Charlotte H. Elliott and Frederick Elliott claim title to said lands in fee simple, but your orator insists that the said Charlotte H. Elliott and Frederick Elliott are chargeable with constructive notice of the several Acts of Congress of the United States pleaded herein, and of the laws in regard to public lands of the United States and the disposal thereof, and that under the Act of Congress and the laws relating to the disposal of public lands of the United States and the acts and doings of said Coos Bay Wagon Road Company no title could pass to said Charlotte H. Elliott and Frederick Elliott, and that said patents should be cancelled as to them, as well as to the grantee therein, the Coos Bay Wagon Road Company.

Par. XVIII. And your orator further shows unto your honors that it is informed and believes and so charges the fact to be that John Weaver, defendant herein, claims to be the owner in fee simple of that portion of the Southwest quarter of the Northeast quarter of Section 13, Township 26 South, Range 13 West, of the Willamette Meridian, described as follows, to-wit, beginning at the Southeast corner of the Northwest quarter of the Northeast quarter of said Section 13, and run-

ning thence north 10 rods, thence west 80 rods, thence south 10 rods, thence east 80 rods to the place of beginning, his claim of title being as follows, viz., a deed to him through a chain of mesne conveyances from the patentee. That said John Weaver claims possession of said lands, and the same, together with the improvements thereon, are of the value of \$1,000.

That said John Weaver claims title to said lands in fee simple, but your orator insists that said John Weaver is chargeable with constructive notice of the several Acts of Congress of the United States pleaded herein, and of the laws in regard to public lands of the United States and the disposal thereof, and that under the Acts of Congress and the laws relating to the disposal of public lands of the United States and the acts and doing of said Coos Bay Wagon Road Company no title could pass to said John Weaver, and that said patent should be cancelled as to him, as well as to the grantee therein, the Coos Bay Wagon Road Company.

Par. XIX. And your orator further shows unto your honors that John Norman, defendant herein, claims to be the owner in fee simple of the Northwest quarter of the Northeast quarter of Section 13, Township 26 South, of Range 13 West, of Willamette Meridian, his claim of title being as follows, viz., a deed to him through a chain of mesne conveyances from the patentee. That said John Norman claims possession of said lands, and the

same, together with the improvements thereon, are of the value of \$2,750.

That said John Norman claims title to said lands in fee simple, but your orator insists that the said John Norman is chargeable with constructive notice of the several Acts of Congress of the United States pleaded herein, and of the laws in regard to public lands of the United States and the disposal thereof, and that under the Acts of Congress and the laws relating to the disposal of public lands of the United States and the acts and doings of said Coos Bay Wagon Road Company no title could pass to said John Norman, and that said patent should be cancelled as to him, as well as to the grantee therein, the Coos Bay Wagon Road Company.

Par. XX. And your orator further shows unto your honors that it is informed and believes and so charges the fact to be that C. C. Bonebrake, defendant herein, claims to be the owner in fee simple of the Southeast quarter of the Southeast quarter of Section 1, Township 26 South, Range 13 West, of the Willamette Meridian, his claim of title being as follows, viz., a deed to him through a chain of mesne conveyances from the patentee. That said C. C. Bonebrake claims possession of said lands, and the same, together with the improvements thereon, are of the value of \$2,000.

That said C. C. Bonebrake claims title to said lands in fee simple, but your orator insists that the said C. C. Bonebrake is chargeable with construc-



tive notice of the several Acts of Congress of the United States pleaded herein and of the laws in regard to public lands of the United States and the disposal thereof, and that under the Acts of Congress and the laws relating to the disposal of public lands of the United States and the acts and doings of the said Coos Bay Wagon Road Company no title could pass to said C. C. Bonebrake, and that said patent should be cancelled as to him, as well as to the grantee therein, the Coos Bay Wagon Road Company.

Par. XXI. And your orator further shows unto your honors that it is informed and believes and so charges the fact to be that the Southern Oregon Company, defendant herein, claims to be the owner in fee simple of all the lands described herein, except those lands hereinbefore mentioned as being claimed by Lorenz Vogl, John Vogl, Mathias Vogl, W. S. Hamilton, Mary Mark, Charlotte H. Elliott, Frederick Elliott, John Weaver, John Norman and C. C. Bonebrake, its claim of title being as follows, viz., a deed to it through a chain of mesne conveyances from the patentee. That said Southern Oregon Company claims possession of said lands, and the same, together with the improvements thereon, are of the value of \$22,000.

That said Southern Oregon Company claims title to said lands in fee simple, but your orator insists that said Southern Oregon Company is chargeable with constructive notice of the several Acts of Congress of the United States pleaded here-

in, and of the laws in regard to the public lands of the United States and the disposal thereof, and that under the Acts of Congress and the laws relating to the disposal of public lands of the United States and the acts and doings of said Coos Bay Wagon Road Company no title could pass to said Southern Oregon Company, and that said patents should be cancelled as to it, as well as to the grantee therein, the said Coos Bay Wagon Road Company.

For as much, therefore, as your orator is without adequate remedy in a court of law, and to the end that said defendants may, if they can, show why your orator should not have the relief prayed, and the matters herein may be determined according to equity and good conscience, your orator brings this suit, and prays that the patent purporting to convey title to said above described lands may be set aside, cancelled and declared null and void, and that said several mesne conveyances from said Coos Bay Wagon Road Company to the said defendants herein may be set aside, cancelled and declared null and void, and your orator prays all other and proper relief in the premises.

And may it please your honors to grant unto your orator the writ of subpoena issuing out of and under the seal of this court, directed to the defendants, commanding the defendants on a day certain, and under a certain penalty therein to be specified, personally to be and appear in this court, and then and there to answer, but not under oath

(answer under oath being expressly waived), and to abide such order and decree as to your honors may seem proper.

JUDSON HARMON,

Attorney General of the United States.

DANIEL R. MURPHY,

United States Attorney for Oregon.

Filed February 29, 1896.

DEMURRER.

Filed May 25, 1896.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said Complainant's Bill contained to be true, in such manner and form as the same are therein set forth, doth demur thereto, and for cause of Demurrer, sheweth:

I.

That said complainant hath not in and by said Bill made or stated such a cause as doth or should entitle it to any relief as is thereby sought and prayed for from or against this defendant.

II.

That it appeareth by the complainant's own showing in the said Bill that the complainant is not entitled to the relief prayed for by the Bill against this defendant.

III.

That it appeareth by said Bill of Complaint that the complainant is without equity in the premises, and is not entitled to any relief.

IV.

That said Bill of Complaint doth not contain any matter of equity wherein this court can grant any decree, or give to the complainant any relief against this defendant.

V.

That it appeareth by said Bill of Complaint that the complainant hath no interest in the subject-matter of this suit, nor in the relief prayed for therein.

VI.

That it doth not appear and is not shown by said Bill of Complaint that this defendant is not a purchaser in good faith and for a valuable consideration of all the lands described therein.

VII.

That it doth not appear and is not shown by said Bill of Complaint that the several defendants alleged to be grantees of the Coos Bay Wagon Road Company, or of portions of the land alleged to have been patented to that company, are not bona fide purchasers of the lands alleged in said Bill to be in their possession and to be claimed by them under conveyances from said company.

VIII.

That it doth not appear by said Bill of Complaint that the complainant is without a full, speedy, adequate and complete remedy at law, or that its alleged cause of suit is within the jurisdiction of a court of equity.



Wherefore, and for divers other defects and causes of Demurrer appearing in the said complainant's said Bill, this defendant doth demur thereto, and humbly demands the judgment of this honorable court whether he shall be compelled to make any answer to the said Bill; and prays to be hence dismissed, with its reasonable costs in this behalf most wrongfully sustained.

JOHN A. GRAY,  
JAMES F. WATSON,  
B. B. BEEKMAN,  
E. B. WATSON,  
Solicitors for Defendants.

#### ANSWER OF COOS BAY WAGON ROAD CO.

Filed March 10, 1897.

The Answer of the Coos Bay Wagon Road Company, defendant, to the Bill of Complaint of the United States of America, complainant:

This defendant saving and reserving to itself all and all manner of benefit and advantage of exception, which can or may be had or taken to the said complainant's said Bill of Complaint, for answer thereto, or to so much thereof as this defendant is advised is in any wise material or necessary for it to make answer unto, answers and says: That it admits that during all of the times mentioned in the Bill of Complaint the Coos Bay Wagon Road Company and the Southern Oregon Company, and each of them, were corporations duly incorporated under and by virtue of the general

laws of the State of Oregon; and that on the 3d day of March, 1869, the Congress of the United States passed an act granting to the State of Oregon to aid in the construction of a Military Wagon Road from the navigable waters of Coos Bay to Roseburg, in the State of Oregon, containing all the provisions alleged in the Bill of Complaint; and that on the 22d day of October, 1870, the Legislative Assembly of the State of Oregon passed an act entitled "An Act donating certain lands to the Coos Bay Wagon Road Company," containing all of the provisions alleged in the Bill of Complaint; and that on the 19th day of September, 1872, the Governor of the State of Oregon made and issued his certificate containing all of the provisions alleged in the Bill of Complaint; and that on the 18th day of June, 1874, the Congress of the United States passed an act reciting that certain lands had theretofore been granted to the State of Oregon by Acts of Congress, to aid in construction of certain Military Wagon Roads in said state, and containing all of the provisions for issuing patents alleged in the Bill of Complaint; and that on the 21st day of April, 1876, the Congress of the United States passed an act entitled "An Act to confirm pre-emption and homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the Land Department, containing all of the provisions alleged and recited in the Bill of Complaint.

This defendant admits that on the 26th day of March, 1873, there was certified to the Coos Bay Wagon Road Company the Northwest quarter of the Southwest quarter, Section 25, Township 27 South, of Range 12 West, of the Willamette Meridian; but denies that on the 26th day of March, 1873, or at any other time prior to the 12th day of February, 1875, the President of the United States issued to the defendant, the Coos Bay Wagon Road Company, a patent for any of the lands described in the Bill of Complaint.

This defendant admits that on said 12th day of February, 1875, the President of the United States issued a patent to the defendant Coos Bay Wagon Road Company for all of the lands described in Paragraphs 8 and 9 of the Bill of Complaint, except the Southeast quarter of the Southeast quarter of Section 1, Township 26 South, of Range 13 West, of the Willamette Meridian; but denies that said last-mentioned tract was included in said patent, or any patent ever issued to said Coos Bay Wagon Road Company.

This defendant admits that on the .. day of January, 1869, Samuel C. Braden was duly qualified to make a homestead entry under the laws of the United States of America; but denies that it has any knowledge, recollection, information or belief that said Braden on said date or at any other time settled upon said Northwest quarter of Southwest quarter of Section 25, Township 27 South, of Range 12 West, of the Willamette Meridian, with

the intention of homesteading the same; and denies that it has any knowledge, recollection, information or belief that said Braden has ever since said .. day of January, 1869, or at any time since, continued to reside upon said land, or to cultivate or improve the same; or that on the .. day of ....., 189.., or within ninety days, or any other period, from the date of the filing of the township plat of the surveyor of said lands in the District Land Office at Roseburg, Oregon, said Braden in good faith or otherwise made application for filing a homestead covering said premises at the Roseburg Land Office, in the State or District of Oregon.

And this defendant denies that it has any knowledge, information, recollection or belief that the Southeast quarter of Southeast quarter in Section 19, the North half of the Northeast quarter, the North half of the Northwest quarter, the Southeast quarter of Northwest quarter, and Southwest quarter of Northeast quarter in Section 29; the West half of Northwest quarter of Section 33, Township 25 South, Range 12 West, of the Willamette Meridian; the West half of Northwest quarter and Northwest quarter of Southwest quarter, Section 5; the Northwest quarter of Northeast quarter, North half of Northwest quarter, Southwest quarter of Northwest quarter, and Northwest quarter of Southwest quarter of Section 7, Township 26 South, of Range 12 West, of the Willamette Meridian; the Northwest quarter, the West half of Northeast quarter, the Northwest quarter of the South-



west quarter, and Lot 1, Section 13; the West half of Southeast quarter and Southeast quarter of Southeast quarter, Section 1, Township 26 South, Range 13 West, of the Willamette Meridian, or any of said lands, or any portion thereof, lie entirely or at all without the limits of the grant to the said State of Oregon, subsequently granted to the defendant, the Coos Bay Wagon Road Company, by the said State of Oregon, by the Act of its Legislative Assembly as aforesaid; but on the contrary avers, according to the best of its knowledge, recollection, information and belief, that all said lands lie within the limits of said grant.

This defendant denies that it has any knowledge, recollection, information or belief that the ministerial or any officers of the United States of America, orator herein, acted erroneously or contrary to the law in issuing said, or any, patent for said lands, or any of them, to said Coos Bay Wagon Road Company, under the facts stated in the Bill of Complaint, or otherwise; but avers that, according to the best of its knowledge, recollection, information and belief, said ministerial, or other, officers did not act erroneously or contrary to the law in issuing said patent or any patent to said Coos Bay Wagon Road Company for said lands, but that their said action in the premises was, in all respects, regular and in conformity with the law.

But this defendant denies that it was or is chargeable with constructive or any notice of the several, or any of the several, Acts of Congress of

the United States pleaded herein, or of the laws of the United States in regard to the public lands of the United States, or any of them, except as the same are recited or referred to in said certificate list of March 26, 1873, or said patent of February 12, 1875, or involved in the issuance thereof; and denies that it was or is chargeable with constructive or any notice that under the Acts of Congress and the laws relating to the disposal of public lands, and the acts and doings of itself, or any of said Acts of Congress, laws, acts or doings, or otherwise, no title could pass to it, or that said patent or patents, or any of them, should be cancelled as to it, the Coos Bay Wagon Road Company.

And this defendant, to so much of the Bill of Complaint as seeks a cancellation of the patent alleged therein to have been issued by the President of the United States to the defendant Coos Bay Wagon Road Company, on the 26th day of March, 1873, or the patent issued by the President of the United States to the defendant Coos Bay Wagon Road Company on the 12th day of February, 1875, for the Northwest quarter of Southwest quarter of Section 25, Township 27 South, of Range 12 West, of the Willamette Meridian, containing 40 acres; Southeast quarter of Southeast quarter, in Section 19, Township 25 South, Range 12 West, 40 acres; the North half of the Northeast quarter, the North half of the Northwest quarter, the Southeast quarter, Northwest quarter and Southwest quarter, Northeast quarter, in Section 29, Township 25

South, Range 12 West, 240 acres; the West half of the Northwest quarter of Section 33, Township 25 South, Range 12 West, 80 acres; the West half, Northwest quarter, and Northwest quarter of Southwest quarter, Section 5, Township 26 South, Range 12 West, 113.31 acres; the Northwest quarter, Northeast quarter, North half Northwest quarter, Southwest quarter Northwest quarter, and Northwest quarter Southwest quarter, Section 7, Township 26 South, Range 12 West, 196.70 acres; the Northwest quarter, the West half Northeast quarter, Northwest quarter Southwest quarter, and Lot 1, Section 13, Township 26 South, Range 13 West, 309.58 acres; the West half Southeast quarter, and Southeast quarter Southeast quarter, Section 1, Township 26 South, Range 13 West, 130 acres, containing in all 1,099.59 acres, or to have said patents or patent set aside, cancelled or declared null and void, or seeks any relief against it, and as a full defense thereto, answers and says: .

That it is true as alleged in the Bill of Complaint that during all of the times mentioned therein, the defendant Coos Bay Wagon Road Company was a corporation, duly incorporated under and by virtue of the general laws of the State of Oregon; and that during all of said times the defendant Southern Oregon Company was a corporation, duly incorporated under and by virtue of the general laws of said state; and that on March 3, 1869, the Congress of the United States passed an act granting to the State of Oregon, to aid in the



construction of a Military Wagon Road from the navigable waters of Coos Bay to Roseburg, in the State of Oregon, the alternate sections of public lands designated by odd numbers, to the extent of three sections in width on each side of said road, and said act provided for the right of indemnity for losses sustained within the original grant to the extent of six miles on either side of the line of road, and said act further provided that the lands granted should not exceed three sections per mile for each mile of road actually constructed, and that said act further provided that said grant should not embrace any mineral lands of the United States, or any lands to which pre-emption or homestead rights had attached, and that all lands reserved or appropriated should be reserved from the operation of the act; and that on October 22, 1870, the Legislative Assembly of the State of Oregon passed an act entitled "An Act donating certain lands to the Coos Bay Wagon Road Company," which act, after referring to the Act of Congress aforesaid, granted to the Coos Bay Wagon Road Company all lands, rights, privileges and immunities granted or pledged to the State of Oregon by said Act of Congress aforesaid, for the purpose of aiding said Coos Bay Wagon Road Company in constructing the road mentioned and described in said Act of Congress aforesaid, and upon the conditions and immunities therein prescribed; that thereupon said Coos Bay Wagon Road Company duly accepted said grant and en-



tered upon the construction of said Military Wagon Road, and thereafter, and prior to September 19, 1872, duly constructed and completed the same in accordance with the provisions of said Act of Congress passed March 3, 1869, and said Act of the Legislative Assembly of the State of Oregon passed October 22, 1870, and on September 19, 1872, the Governor of the State of Oregon made and issued a certificate stating that the Coos Bay Wagon Road Company had constructed its road in accordance with said Act of Congress approved March 3, 1869, and with said Act of the Legislative Assembly of the State of Oregon approved October 22, 1870, as alleged in the Bill of Complaint.

That prior to the passage of said Act of Congress of March 3, 1869, making said grant to aid in the construction of said Military Wagon Road, and up to March 26, 1873, all said premises were public lands of the United States, and subject to disposal by the Land Department thereof, and on said day the Secretary of the Interior, as head of said Department in execution of the provisions of said Act of Congress, approved March 3, 1869, relating to said grant, approved, certified and issued in the name of the United States to said Coos Bay Wagon Road Company, a list of lands as inuring to the State of Oregon, under said grant, describing and including said premises and other lands and reciting that said Northwest quarter of the Southwest quarter, of Section 25, Township 27 South, of Range 12 West, and said West half of Southeast quarter

of Section 1, Township 26 South, of Range 13 West of the Willamette Meridian were with the three mile limits, and all of the remainder of said premises within the six mile limits of said grant and thereafter on February 9, 1875, a copy of said list duly certified to be true and correct by William R. Willis, Register, and J. W. Fullerton, Receiver, of the United States Land Office at Roseburg, Oregon, under date of June 30, 1873, was by said Coos Bay Wagon Road Company, filed for record in the office of the County Clerk of Coos County, Oregon, where said premises lay, and recorded on page 419, of Book 4, of the Records of Conveyances of said County, and afterwards on June 11, 1880, said original list was by said Coos Bay Wagon Road Company duly filed for record in the office of said clerk and duly recorded on page 62, of Book 9, of the Records of Conveyances of said County, and that on June 18, 1874, the Congress of the United States passed an act, as alleged in the Bill of Complaint, which after reciting that certain lands had theretofore been granted by Acts of Congress to the State of Oregon to aid in the construction of certain military wagon roads in said State, and that there was no existing law providing for the issuing of formal patents for said land, provided, "That in all cases, when the roads, in aid of the construction of which said lands were granted, are shown by the certificate of the Governor of the State of Oregon, as in said act provided, to have been constructed and completed, patents for said land shall issue in due form to the

State of Oregon, as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall, by public act, have transferred its interests in said land to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations, upon the payment of the necessary expenses thereof; provided that this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind, except to provide for issuing patents for lands to which the State is already entitled;" and on February 12, 1875, the Land Department of the United States, in pursuance of the provisions of said Act of Congress, passed June 18, 1874, duly issued a patent for all of said premises, and other lands described and included in said list, except said Northwest quarter of Southwest quarter of Section 25, Township 27 South, of Range 12 West, in due form of law from the United States of America to said Coos Bay Wagon Road Company, under the signature of the President of the United States and Seal of the General Land Office thereof, referring to said Acts of Congress, and said Act of the Legislative Assembly of the State of Oregon, and reciting that said premises and other lands lay respectively within the three and six miles limits of said grant, as shown by the list above mentioned, and conveying the same in fee simple to said Coos Bay Wagon Road Company, as alleged in the Bill of Complaint; and afterwards on March 19, 1884, said Coos Bay Wagon Road Com-



pany filed said patent for record in the office of the County Clerk of said Coos County, Oregon, and the same was thereupon duly recorded on page 102, of Book 13, of the Record of Conveyances of said County.

That said Coos Bay Wagon Road Company, prior to the issuance of said list and patent to it, as aforesaid, paid the United States a valuable and adequate consideration for said premises and other lands described therein and conveyed thereby, in constructing and completing said Military Wagon Road, in accordance with the provisions and upon the conditions expressed in said grant, and accepted and recorded the same as aforesaid, and thereupon and thereafter assumed and exercised dominion and ownership thereof, until the execution of the conveyances next hereinafter mentioned, placing confidence in the correctness of the action of the Land Department aforesaid approving and issuing said list and patent, and in the truth of the recitals therein that said premises and other lands lay respectively within the three and six miles limits of said grant, and fully believing the same, and that it was justly and legally entitled to a conveyance of said premises and other lands from the United States as a part of said grant, and at or before the respective times of payment of said consideration, and accepting and recording said list and patent, and exercising dominion and ownership over said premises and other lands, and executing said conveyances thereof, it had no notice whatever that said premises and



other lands, or any of them, lay without the limits of said grant or that the ministerial or any officers of the United States had acted erroneously or contrary to the law in approving, or certifying, or issuing said list or patent, under the facts stated in the Bill of Complaint, or otherwise, or of any defect whatever in the title to said premises and other land, or any of them, therein described and thereby conveyed, and it was and is a purchaser in good faith and for a valuable consideration of all of said premises and other lands.

That on January 7, 1884, this defendant, Coos Bay Wagon Road Company, by deed with covenants of general warranty of said date conveyed said Northeast quarter of Northwest quarter of Section 7, Township 26, and Northwest quarter of Southwest quarter of Section 25, Township 27 South, of Range 12 West of the Willamette Meridian, and other lands to W. H. Besse, for the consideration of \$91,715.05 paid to it, which deed was duly filed by said Bessee for record and recorded March 19, 1884, on page 110, of Book 13, of the Record of Deeds of Coos County, Oregon, where said premises and other lands are situated; and on May 19, 1873, by Deed of Bargain and Sale of that date, conveyed said Southwest quarter of the Northwest quarter and Northwest quarter of the Southwest quarter of Section 7, Township 26 South, of Range 12 West of the Willamette Meridian, to Mary M. Noah for the consideration of \$200 paid it, which deed recited said consideration, was by said Mary Noah, filed for record

and recorded May 19, 1873, on page 570, of Book 2, of the Record of Deeds of said Coos County, Oregon; and on May 31, 1875, by Deed of Bargain and Sale of that date, conveyed said Southeast quarter of the Southeast quarter of Section 19; North half of Northeast quarter of Northeast quarter, Southeast quarter of Northwest quarter, and Southwest quarter of Northeast quarter of Section 29; and West half of Northwest quarter of Section 33, Township 25; Southwest quarter of Northwest quarter, Northwest quarter of Southwest quarter of Section 5; and Northwest quarter of the Northeast quarter of Section 7, Township 20 South, of Range 12 West; West half of the Southeast quarter of Section 1; Northwest quarter, Northwest quarter of Southwest quarter, Southeast quarter of Northeast quarter, Northwest quarter of Northeast quarter, and Lot 1 of Section 13, Township 26 South, of Range 13 West of the Willamette Meridian, and other lands of John Miller for the consideration of \$35,534 paid to it, which deed reciting said consideration, was by said Miller filed for record and recorded June 15, 1875, on pages 320-328, of Book 5, of the Record of Deeds of said Coos County, Oregon; and on September 15, 1890, by Deed of Bargain and Sale of that date conveyed Lots 3 and 4, of Section 5, Township 26 South, of Range 12 West of the Willamette Meridian to W. S. Hamilton for a valuable consideration to it paid, which deed reciting such consideration was by said Hamilton filed for record and recorded December 2,

1890, on page —, of Book —, of the Records and Deeds of said Coos County, Oregon.

That each of said deeds was duly executed by this defendant, Coos Bay Wagon Road Company, in good faith and under the full belief that it had good title to said lands under said list and patent, in fee simple absolute, with full power to dispose of the same, and the considerations so paid to it for said lands as aforesaid, were duly applied towards the payment of the costs and expenses incurred by it in constructing and completing said Military Wagon Road, and in selling and disposing of said lands, and the remainder divided among its stockholders, in like good faith without any notice of any claim of the complaint, the United States of America, in or to said lands or any of them, and more than fifteen years prior to the commencement of this suit.

And this defendant further says that to the best of its knowledge, information, recollection, and belief, said Military Wagon Road from the navigable waters of Coos Bay to Roseburg, Oregon, was laid out and constructed by said Coos Bay Wagon Road Company through the Northwest quarter of Section 33, the Northeast quarter of Section 32, the Southwest quarter of Section 29, and the South half of Section 30, Township 26 South, of Range 12 West of the Willamette Meridian, and that no part of said premises is more than six miles distant from the line of said road; and that such has been the general understanding and belief of all persons living in the vicinity of said premises and road, ever since



its completion in 1872, until the present time; and both said list approved by the Secretary of the Interior and issued to said Coos Bay Wagon Road Company for said premises and other lands, as inuring to the State of Oregon, under said grant, on March 26, 1873, and patent issued therefor on February 12, 1875, recorded as aforesaid, recite that said premises lie respectively within the three and six miles limits of said grant, and this defendant fully believed in and relied upon such recital in so disposing of said lands and the proceeds arising from the sale thereof, as aforesaid.

And this defendant denies all and all manner of unlawful combination and confederacy, wherewith it is by the said bill charged; *without this*, that there is any other matter, cause, or thing, in the said Bill of Complaint contained, (material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied), is true, to the knowledge or belief of this defendant; and which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct; and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

JAMES F. WATSON,

B. B. BEEKMAN,

E. B. WATSON,

Solicitors for Defendants.



## ANSWER OF SOUTHERN OREGON COMPANY.

Filed March 10, 1897.

The Answer of Southern Oregon Company, defendant, to the Bill of Complaint of the United States of America, Complainant.

This defendant saving and reserving to itself, all, and all manner of benefit and advantage of exception, which can or may be had or taken to the said complainant's said Bill of Complaint, for answer thereto, or to so much thereof as this defendant is advised is in anywise material or necessary for it to make answer unto, answers and says: That it admits that during all of the times mentioned in the Bill of Complaint, the Coos Bay Wagon Road Company and the Southern Oregon Company, and each of them, were corporations duly incorporated under and by virtue of the general laws of the State of Oregon; and that on the 3rd day of March, 1869, the Congress of the United States passed an act granting to the State of Oregon, to aid in the construction of a Military Wagon Road from the navigable waters of Coos Bay, to Roseburg in the State of Oregon, containing all the provisions alleged in the Bill of Complaint; and that on the 22nd day of October, 1870, the Legislative Assembly of the State of Oregon passed an Act entitled, "An Act donating certain lands to the Coos Bay Wagon Road Company," containing all of the provisions alleged in the Bill of Complaint; and that on the 19th day of September, 1872, the Governor of the State of Oregon made

and issued his certificate containing all of the provisions alleged in the Bill of Complaint; and that on the 18th day of June, 1874, the Congress of the United States passed an Act reciting that certain lands had theretofore been granted by Acts of Congress to the State of Oregon, to aid in the construction of certain Military Wagon Roads in said State, and containing all of the provisions for issuing patents alleged in the Bill of Complaint; and that on the 21st day of April, 1876, the Congress of the United States passed an Act, entitled "An Act to confirm preemption and homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the Land Department," containing all of the provisions alleged and recited in the Bill of Complaint:

This defendant admits that on the 26th day of March, 1873, there was certified to the Coos Bay Wagon Road Company the Northwest quarter of the Southwest quarter of Section 25, Township 27 South, of Range 12 West of the Willamette Meridian; but denies that on the 26th day of March, 1873, or at any other time prior to the 12th day of February, 1875, the President of the United States issued to the defendant, the Coos Bay Wagon Road Company a patent for any of the lands described in the Bill of Complaint.

This defendant admits that on said 12th day of February, 1875, the President of the United States issued a patent to the defendant, Coos Bay Wagon Road Company, for all of the lands described in

paragraphs 8 and 9, of the Bill of Complaint, except the Southeast quarter of the Southeast quarter of Section 1, Township 26 South, of Range 13 West of the Willamette Meridian; but denies that said last mentioned tract was included in said patent, or any patent ever issued to said Coos Bay Wagon Road Company.

This defendant admits that on the.....day of January, 1869, Samuel C. Braden was duly qualified to make a homestead entry under the laws of the United States of America; but denies that it has any knowledge, recollection, information, or belief, that said Braden on said date or at any other time settled upon said Northwest quarter of the Southwest quarter of Section 25, Township 27 South, of Range 12 West of the Willamette Meridan, with the intention of homesteading the same; and denies that it has any knowledge, recollection, information, or belief, that said Braden has ever since said ..... day of January, 1869, or at any time since continued to reside upon said land, or to cultivate or to improve the same; or that on the...day of.....189..., or within ninety days, or any other period, from the date of the filing of the Township Plat of the Surveyor of said lands in the District Land Office at Roseburg, Oregon, said Braden in good faith or otherwise made application for filing a homestead, covering said premises, at the Roseburg Land Office, in the State of District of Oregon.

And this defendant denies that it has any knowledge, information, recollection or belief, that the



Southeast quarter of the Southeast quarter of Section 19; the North half of Northeast quarter, the North half of Northwest quarter, the Southeast quarter of the Northwest quarter, and Southwest quarter of Northeast quarter in Section 29; the west half of the Northwest quarter of Section 33, Township 25 South, Range 12 West of the Willamette Meridian; the West half of the Northwest quarter and Northwest quarter of the Southwest quarter of Section 5; the Northwest quarter of the Northeast quarter, North half of the Northwest quarter, Southwest quarter of the Northwest quarter, and Northwest quarter of the Southwest quarter of Section 7, Township 26 South, of Range 12 West of the Willamette Meridian; the Northwest quarter, the West half of the Northeast quarter, the Northwest quarter of the Southwest quarter, and Lot 1, Section 13; the West half of Southeast quarter and Southeast quarter of the Southeast quarter, Section 1, Township 26 South, Range 13 West of the Willamette Meridian, or any of said lands, or any portion thereof, lie entirely or at all, without the limits of the grant to the said State of Oregon, subsequently granted to the defendant, the Coos Bay Wagon Road Company, by the said State of Oregon, by the Act of the Legislative Assembly as aforesaid; but on the contrary avers according to the best of its knowledge, recollection, information and belief that all said lands lie within the limits of said grant.

And this defendant denies that it has any knowledge, recollection, information, or belief, that the



ministerial or any officers of the United States of America, orator herein, acted erroneously or contrary to the law in issuing said, or any, patent for said lands, or any of them, to said Coos Bay Wagon Road Company, under the facts stated in the Bill of Complaint or otherwise; but avers that according to the best of its knowledge, recollection, information and belief, said ministerial or other, officers, did not act erroneously or contrary to the law, in issuing said patent or any patent to said Coos Bay Wagon Road Company, for said lands, but that their said action in the premises was, in all respects, regular and in conformity with the law.

This defendant admits that it claims to be the owner in fee simple of the following tracts or parcels of the land above described.

The Northwest quarter of the Southwest quarter of Section 25, Township 27 South, of Range 12 West, of the Willamette Meridian, containing 40 acres; the Southeast quarter of the Southeast quarter of Section 19; North half of Northeast quarter, the North half of the Northwest quarter, the Southeast quarter of the Northwest quarter, and the Southwest quarter of the Northeast quarter of Section 29, Township 25 South, of Range 12 West, of the Willamette Meridian; the Southwest quarter of the Northwest quarter, the Northwest quarter of the Southwest quarter of Section 5; the Northwest quarter of the Northeast quarter, Northeast quarter of the Northwest quarter, Southwest quarter of the Northwest quarter, and Northwest quarter of the

Southwest quarter of Section 7, Township 26 South, of Range 12 West, of the Willamette Meridian; and the West half of the Southeast quarter of Section 1, Township 26 South, of Range 13 West, of the Willamette Meridian, containing 636.70 acres, and none other, nor any greater quantity thereof, and that it claims possession of said tracts or parcels of land last above described, and that its claim of title there-to is based upon deeds to it through chains of mesne conveyance from said Coos Bay Wagon Road Company, patentee of the United States, hereinafter set forth, and that the same, together with the improvements thereon, are of the value of \$22,000, as alleged in the Bill of Complaint.

But this defendant denies that it was or is chargeable with constructive or any, notice of the several, or any of the several Acts of Congress of the United States pleaded herein, or of the laws of the United States in regard to the public lands of the United States, or any of them, except as the same are recited or referred to in said certified list of March 26, 1873, or said patent of February 12th, 1875, or involved in the issuance thereof; and denies that it was or is chargeable with constructive or any notice that under the Acts of Congress and the laws relating to the disposal of public lands, and the acts and doings of said Coos Bay Wagon Road Company, or any of said Acts of Congress, laws, acts or doings, or otherwise, no title could pass to it, or that said patent, or patents, or any of them should be can-

celled as to it, or as to the grantee therein, the Coos Bay Wagon Road Company.

And this defendant, to so much of the Bill of Complaint as seeks a cancellation of the patent alleged therein, to have been issued by the President of the United States to the defendant, Coos Bay Wagon Road Company on the 26th day of March, 1873, or the patent issued by the President of the United States to the defendant, Coos Bay Wagon Road Company, on the 12th day of February, 1875, for the Northwest quarter of the Southwest quarter of Section 25, Township 27 South, of Range 12 West, of the Willamette Meridian, containing 40 acres; the Southeast quarter of the Southeast quarter of Section 19; North half of the Northeast quarter, the North half of the Northwest quarter, the Southeast quarter of the Northwest quarter, and the Southwest quarter of the Northeast quarter of Section 29, Township 25 South, of Range 12 West, of the Willamette Meridian; the Southwest quarter of the Northwest quarter, the Northwest quarter of the Southwest quarter of Section 5; the Northwest quarter of the Northeast quarter, Northeast quarter of Northwest quarter, Southwest quarter of the Northwest quarter, and the Northwest quarter of the Southwest quarter of Section 7, Township 26 South, of Range 12 West, of the Willamette Meridian; and the West half of Southeast quarter of Section 1, Township 26 South, of Range 13 West, of the Willamette Meridian, containing 636.70 acres, to which it claims title and possession through mesne con-

veyances from the defendant, Coos Bay Wagon Road Company, as alleged therein, is so far as the cancellation of said patents or patent, may affect its title to or possession of said lands and to so much thereof as seeks to have said patents or patent and the mesne conveyances from said Coos Bay Wagon Road Company, patentee, to it for said lands, set aside, cancelled, and declared null and void, or seeks any other relief against it, and as a full defense thereto, answers and says :

That it is true as alleged in the Bill of Complaint, that during all of the times mentioned therein, the defendant, Coos Bay Wagon Road Company, was a corporation, duly incorporated under and by virtue of the general laws of the State of Oregon ; and that during all of said times, the defendant, the Southern Oregon Company, was a corporation, duly incorporated under and by virtue of the general laws of said State ; and that on March 3, 1869, the Congress of the United States passed an Act granting to the State of Oregon, to aid in the construction of a Military Wagon Road from the navigable waters of Coos Bay to Roseburg, in the State of Oregon, the alternate sections of public land designated by odd numbers, to the extent of three sections in width on each side of said road, and said Act provided for the right of indemnity for losses sustained within the original grant to the extent of six miles on either side of the line of road, and said Act further provided that the lands granted should not exceed three sections per mile for each mile of road actually con-



structed; and that said act further provided that said grant should not embrace any mineral lands of the United States, or any lands to which pre-emption or homestead rights had attached, and that all lands reserved or appropriated should be reserved from the operation of the Act; and that on October 22, 1870, the Legislative Assembly of the State of Oregon passed an Act, entitled "An Act donating certain lands to the Coos Bay Wagon Road Company," which Act referring to the Act of Congress aforesaid, granted to the Coos Bay Wagon Road Company all lands, rights, privileges and immunities, granted or pledged to the State of Oregon by said Act of Congress aforesaid, for the purpose of aiding said Coos Bay Wagon Road Company in constructing the road mentioned and described in said Act of Congress aforesaid, and upon the conditions and immunities therein prescribed; that thereupon said Coos Bay Wagon Road Company duly accepted said grant and entered upon the construction of said Military Wagon Road, and thereafter and prior to September 19, 1872, duly constructed and completed the same in accordance with the provisions of said Act of Congress, passed March 3, 1869, and said Act of the Legislative Assembly of the State of Oregon, passed October 22, 1870, and on September 19, 1872, the Governor of the State of Oregon made and issued a certificate stating that the Coos Bay Wagon Road Company had constructed its road in accordance with said Act of Congress, approved March 3, 1869, and with said Act of the Legislative Assembly

of the State of Oregon, approved October 22, 1870, as alleged in the Bill of Complaint.

That prior to the passage of said Act of Congress of March 3, 1869, making said grant to aid in the construction of said Military Wagon Road, and up to March 26, 1873, all said premises were public lands of the United States, and subject to disposal by the Land Department thereof, and on said day the Secretary of the Interior as the head of said Department, in execution of the provisions of said Act of Congress, approved March 3, 1869, relating to said grant, approved, certified and issued in the name of the United States to said Coos Bay Wagon Road Company, a list of lands as inuring to the State of Oregon, under said grant, describing and including said premises and other lands and reciting that said Northwest quarter of Southwest quarter of Section 25, Township 27 South, of Range 12 West, and said West half of Southeast quarter of Section 1, Township 26 South, of Range 13 West, of the Willamette Meridian, were within the three-mile limits, and all the remainder of said premises within the six-mile limits of said grant, and thereafter on February 9, 1875, a copy of said list duly certified to be true and correct by William R. Willis, Register, and J. W. Fullerton, Receiver, of the United States Land Office of Roseburg, Oregon, under date of June 30, 1873, was by said Coos Bay Wagon Road Company, filed for record in the office of the County Clerk of Coos County, Oregon, where said premises lay, and recorded on page 419, of Book

4, of the Record of Conveyances of said County; and afterwards on June 11, 1880, said original list was by said Coos Bay Wagon Road Company duly filed for record in the office of said clerk, and duly recorded on page 62, of Book 9, of the Record of Conveyances of said County; and that on June 18, 1874, the Congress of the United States passed an Act, as alleged in the Bill of Complaint, which after reciting that certain lands had theretofore been granted by Acts of Congress to the State of Oregon, to aid in the construction of certain military wagon roads in said State, and that there was no existing law providing for the issuing of formal patents for said land, provided, "That in all cases, when the roads, in aid of the construction of which said lands were granted, are shown by the certificate of the Governor of the State of Oregon, as in said Act provided, to have been constructed and completed, patents for said land shall issue in due form to the State of Oregon, as fast as the same shall, under said grants, be selected and certified; unless the State of Oregon shall, by public act, have transferred its interests in said land to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations, upon the payment of the necessary expenses thereof; provided that this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind, except to provide for issuing patents for lands to which the State is already entitled," and on February 12, 1875, the Land Depart-



ment of the United States, in pursuance of the provisions of said Act of Congress passed June 18, 1874, duly issued a patent for all said premises, and other lands described and included in said list, except said Northwest quarter of Southwest quarter of Section 25, Township 27 South, of Range 12 West, in due form of law from the United States of America to said Coos Bay Wagon Road Company, under the signature of the President of the United States and Seal of the General Land Office thereof, referring to said Acts of Congress, and said Act of the Legislative Assembly of the State of Oregon, and reciting that said premises and other lands, lay respectively within the three and six-mile limits of said grant, as shown by said list above mentioned, and conveying the same in fee simple to said Coos Bay Wagon Road Company, as alleged in the Bill of Complaint; and afterwards on March 19, 1884, said Coos Bay Wagon Road Company filed said patent for record in the office of the County Clerk of said Coos County, Oregon, and the same was thereupon duly recorded on page 102, of Book 13, of the Records of Conveyances of said County.

That said Coos Bay Wagon Road Company prior to the issuance of said list and patent to it, as aforesaid, paid the United States a valuable and adequate consideration for said premises and other lands described therein and conveyed thereby, in constructing and completing said Military Wagon Road, in accordance with the provisions and upon the conditions expressed in said grant, and accepted and



recorded the same as aforesaid, and thereupon and thereafter assumed and exercised dominion and ownership thereof, until the execution of the conveyance next hereinafter mentioned, placing confidence in the correctness of the action of the Land Department aforesaid approving and issuing said list and patent, and in the truth of the recitals there in that said premises and other lands lay respectively within the three and six-mile limits of said grant, and fully believing the same, and that it was justly and legally entitled to a conveyance of said premises and other lands from the United States as a part of said grant; and at or before the respective times of payment of said consideration, and accepting and recording said list and patent, and exercising dominion and ownership over said premises and other lands, and executing said conveyance thereof, it had no notice whatever that said premises and other lands, or any of them, lay without the limits of said grant or that the ministerial or any officers of the United States had acted erroneously or contrary to the law in approving, or certifying, or issuing said list or patent, under the facts stated in the Bill of Complaint, or otherwise, or of any defect whatsoever in the title to said premises and other lands, or any of them, therein described and thereby conveyed, and it was and is a purchaser in good faith and for a valuable consideration of all of said premises and other lands.

That this defendant claims the title and possession of said premises, as alleged in the Bill of Com-

plaint, under said Coos Bay Wagon Road Company, through the following chains of mesne conveyance:

(1) Deed with covenants of general warranty from said Coos Bay Wagon Road Company to W. H. Besse for said Northeast quarter of Northwest quarter of Section 7, Township 26, and Northwest quarter of Southwest quarter of Section 25, Township 27 South, of Range 12 West, of the Willamette Meridian, and other lands, reciting a consideration paid of \$91,715.05, dated January 7, 1884, and recorded March 19, 1884, on page 119, of Book 13, of the Record of Deeds of Coos County, Oregon.

(2) Deed with covenants of general warranty from said W. H. Besse and.....Besse, his wife, to the Oregon Southern Improvement Company, a corporation, for said premises and other lands, reciting a consideration of \$91,715.05 paid, dated June 4, 1884, and recorded September 8, 1885, on page 236, of Book 14, of the Record of Deeds of said Coos County, Oregon.

(3) Deed of Bargain and Sale from Geo. H. Durham, Master in Chancery, under decree of foreclosure and sale of the Circuit Court of the United States for the District of Oregon, entered April 11, 1887, against said Oregon Southern Improvement Company in suit No. 1344, to W. W. Crapo and W. J. Rotch, for said premises and other lands, reciting a consideration of \$120,000 paid, dated November 16, 1887, and recorded March 31, 1888, on page 175, of Book 16, of the Record of Deeds of said Coos County, Oregon.

(4) Deed of Bargain and Sale from said W. W. Crapo and .....Crapo, his wife, and W. J. Rotch and .....Rotch, his wife, to Southern Oregon Company, this defendant, for said premises and other lands, reciting a consideration of one dollar paid, dated December 14, 1887, and recorded March 31, 1888, on page 213, of Book 16, of the Record of Deeds of said Coos County, Oregon.

(5) Deed of Bargain and Sale from said Coos Bay Wagon Road Company to Mary M. Noah for said Southwest quarter of Northwest quarter and Northwest quarter of Southwest quarter of Section 7, Township 26 South, of Range 12 West, of the Willamette Meridian, and other lands reciting a consideration of \$200 paid, dated May 19, 1873, and recorded May 19, 1873, on page 570, of Book 2, of the Records of Deeds of said Coos County, Oregon.

(6) Deed of Bargain and Sale from said Mary M. Noah and John Noah, her husband, to David N. Turner for said premises and other lands, reciting a consideration of \$180 paid, dated January 25, 1874, and recorded January 25, 1874, on page 326, of Book 3, of the Record of Deeds of said Coos County, Oregon.

(7) Deed of quit claim from said David N. Turner and Emma Turner, his wife, to B. S. Stickney, for said premises and other lands, reciting a consideration of \$250 paid, dated September 15, 1875, and recorded September 15, 1875, on page 519, of Book 5, of the Record of Deeds of said Coos County, Oregon.

(8) Deed with covenants of general warranty from B. S. Stickney to Cortes Corning, for said premises and other lands, reciting a consideration of \$300 paid, dated October 13, 1875, and recorded October 14, 1875, on page 546, of Book 5, of the Record of Deeds of said Coos County, Oregon.

(9) Deed of Bargain and Sale from said Cortes Corning and Charlotte Corning, his wife, to said B. S. Stickney, for said premises and other lands, reciting a consideration of \$300 paid, dated February 7, 1876, and recorded July 12, 1883, on page 124, of Book 12, of the Record of Deeds of said Coos County, Oregon.

(10) Deed of Bargain and Sale from said B. S. Stickney to J. A. Yoakum for said premises, reciting a consideration of \$400 paid, dated November 11, 1880, and recorded February 17, 1881, on page 239, of Book 9, of the Record of Deeds of said Coos County, Oregon.

(11) Deed of Bargain and Sale from said J. A. Yoakum and . . . . . Yoakum, his wife, to H. H. Luse, for said premises, reciting a consideration of \$400 paid, dated January 5, 1881, and recorded February 17, 1881, on page 240, of Book 9, of the Record of Deeds of said Coos County, Oregon.

(12) Deed with covenants of general warranty from said H. H. Luse and . . . . . Luse, his wife, to J. N. Knowles, for said premises and other lands, reciting a consideration of \$100,000 paid, dated June 20, 1883, and recorded July 23, 1883, on page 140, of



Book 12, of the Record of Deeds of said Coos County, Oregon.

(13) Deed with covenants of general warrant from said J. N. Knowles and . . . . . Knowles, his wife, to the Oregon Southern Improvement Company, a corporation, for said premises and other lands, reciting a consideration of \$10 paid, dated November 22, 1883, and recorded January 16, 1884, on page 556, of Book 12, of the Record of Deeds of said Coos County, Oregon.

(14) Deed of Bargain and Sale from Geo. H. Durham, Master in Chancery, under decree of foreclosure and sale of the Circuit Court of the United States for the District of Oregon, entered April 11, 1887, against said Oregon Southern Improvement Company in suit No. 1344, to W. W. Crapo and W. J. Rotch, for said premises and other lands, reciting a consideration of \$120,000 paid, dated November 16, 1887, and recorded March 31, 1888, on page 175, of Book 16, of the Record of Deeds of said Coos County, Oregon.

(15) Deed of Bargain and Sale from W. W. Crapo and . . . . . Crapo, his wife, and W. J. Rotch and . . . . . Rotch, his wife, to Southern Oregon Company, this defendant, for said premises and other lands, reciting a consideration of one dollar paid, dated December 14, 1887, and recorded March 31, 1888, on page 213, of Book 16, of Record of Deeds of said Coos County, Oregon.

(16) Deed of Bargain and Sale from said Coos Bay Wagon Road Company to John Miller for said

Southeast quarter of Southeast quarter of Section 19; North half of Northeast quarter, Southeast quarter of Northwest quarter, and Southwest quarter of Northeast quarter of Section 29, Township 25; Southwest quarter of Northwest quarter, Northwest quarter of Southwest quarter of Section 5; and Northwest quarter of Northeast quarter of Section 7, Township 26 South, of Range 12 West; and West half of Southeast quarter of Section 1, Township 26 South, of Range 13 West, of the Willamette Meridian, and other lands, reciting a consideration of \$35,534 paid, dated May 31, 1875, and recorded June 15, 1875, on pages 320-328, of Book 5, of the Record of Deeds of Coos County, Oregon.

(17) Deed of Bargain and Sale from said John Miller to Collis P. Huntington, Charles Crocker, Leland Stanford, and Mark Hopkins, for said premises and other lands, reciting a consideration of \$35,000 paid, dated June 22, 1875, and recorded July 3, 1875, on page 359, of Book 7, of the Record of Deeds of said Coos County, Oregon.

(18) Deed of Bargain and Sale from said Collis P. Huntington and Elizabeth Huntington, his wife, Leland Stanford and Jane Lathrop Stanford, his wife, and Mary Francis Sherwood Hopkins, widow and sole heir of said Mark Hopkins, deceased, to said Charles Crocker, for said premises and other lands, reciting a consideration of one dollar paid, dated March 27, 1882, and recorded May 2, 1882, on pages 621-631, of Book 9, of the Record of Deeds of said Coos County, Oregon.

(19). Deed of Bargain and Sale from said Charles Crocker and Mary A. Crocker, his wife, to W. H. Besse, for said premises and other lands, reciting a consideration of \$1.75 per acre, paid, dated March 20, 1883, and recorded January 24, 1884, on page 585 of Book 12 of the Record of Deeds of said Coos County, Oregon.

(20). Deed of Quit Claim from said W. H. Besse and . . . Besse, his wife, to Russel Gray, for said premises and other lands, reciting a consideration of ten dollars paid, dated December 29, 1883, and recorded January 31, 1884, on page 602 of Book 12 of the Record of Deeds of said Coos County, Oregon.

(21). Deed of quit claim from said Russel Gray to the Oregon Southern Improvement Company (a corporation) for said premises and other lands, reciting a consideration of ten dollars paid, dated January 5, 1884, and recorded January 31, 1884, on page 611 of Book 12 of the Record of Deeds of said Coos County, Oregon.

(22). Deed of Bargain and Sale from Geo. H. Durham, Master in Chancery, under decree of foreclosure and sale of the Circuit Court of the United States for the District of Oregon, entered April 11, 1887, against said Oregon Southern Improvement Company, in suit No. 1344, to W. W. Crapo and W. J. Rotch, for said premises and other lands, reciting a consideration of \$120,000 paid, dated November 16, 1887, and recorded March 31, 1888, on

page 175 of Book 16 of the Record of Deeds of said Coos County, Oregon.

(23). Deed of Bargain and Sale from said W. W. Crapo and . . . . Crapo, his wife, and W. J. Rotch and . . . . Rotch, his wife, to Southern Oregon Company, this defendant, for said premises and other lands, reciting a consideration of one dollar paid, dated December 14, 1887, and recorded March 31, 1888, on page 213 of Book 16 of the Record of Deeds of said Coos County, Oregon.

And this defendant further says that to the best of its knowledge, information, and belief, said Military Wagon Road from the navigable waters of Coos Bay to Roseburg, Oregon, was laid out and constructed by said Coos Bay Wagon Road Company through the N. W.  $\frac{1}{4}$  of Section 33, the N. E.  $\frac{1}{4}$  of Section 32, the S. W.  $\frac{1}{4}$  of Section 29, and the S.  $\frac{1}{2}$  of Section 30, Township 26, South of Range 12 West of the Willamette Meridian, and that no part of said premises is more than six miles distant from the line of said road; and that such has been the general understanding and belief of all persons living in the vicinity of said premises and road, ever since its completion in 1872, until the present time; and both said list approved by the Secretary of the Interior and issued to said Coos Bay Wagon Road Company for said premises and other lands, as inuring to the State of Oregon under said grant, on March 26, 1873, and patent issued therefor on February 12, 1875, recorded as aforesaid, recite that said premises lie respectively within the three and



six miles limits of said grant; and both said list and patent, and each and all of said deeds constituting the chain of mesne conveyances from said Coos Bay Wagon Road Co., patentee, to this defendant aforesaid, were in due form and regularly executed and recorded on the dates respectively aforesaid, and purported to convey a perfect and indefeasible title to said premises; and the consideration recited in each of said deeds respectively, as aforesaid, was actually paid in money at the time of the execution thereof; and at or before the respective times of payment of said consideration and the delivery and execution of said deeds respectively and the recording thereof aforesaid, said W. H. Besse; Oregon Southern Improvement Company; Mary M. Noah; David N. Turner; B. S. Stickney; Cortes Corning; J. A. Yoakum; H. H. Luse; J. N. Knowles; John Miller; Collis P. Huntington; Charles Crocker; Leland Stanford; and Mark Hopkins; Russel Gray; W. W. Crapo and W. J. Rotch; and the Southern Oregon Company, this defendant, respectively had no notice whatsoever, that said premises of any portion thereof lay without the limits of said grant, or that the ministerial, or any, officers of the United States had acted erroneously or contrary, to the law in approving or issuing said list of patent, or any patent, therefor to said Coos Bay Wagon Road Company, under the facts stated in the Bill of Complaint, or otherwise, or of any Act of Congress, or law relating to the disposal of the public land of the United States, or act or doing

of said Coos Bay Wagon Road Company, or any other matter or thing whatever, preventing the title to said premises from passing to them or any of them under said deeds respectively in fee simple or in any manner impairing or affecting the title thereto under said respective deeds, or any of them, but respectively purchased said premises at the dates of the respective deeds to them aforesaid, and respectively paid the considerations recited therein in money at the time of the execution and delivery thereof to them, on their respective dates aforesaid, and accepted and recorded the same on the respective dates aforesaid, relying upon and induced by said list and patent and said recital therein, and not otherwise, and they and each of them were, and this defendant is, purchasers of said premises in good faith and for a valuable and adequate consideration; and this defendant has ever since receiving and recording said deed for said premises W. W. Crapo and W. J. Rotch, and wives as aforesaid, held the title and possession thereof, and exercised full dominion over the same as absolute owner, in good faith and without any notice of any claim on the part of the United States thereto until the commencement of this suit, and is the owner in fee simple absolute thereof, and justly and legally entitled to the same.

And this defendant denies all and all manner of unlawful combination and confederacy, where-with it is by the said Bill charged; *without this* that there is any other matter, cause, or thing, in the

said Bill of Complaint contained (material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied) is true, to the knowledge or belief of this defendant; and which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct; and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

JAMES F. WATSON,  
B. B. BEEKMAN,  
E. B. WATSON,  
Solicitors for Defendant."

REPLICATION TO THE ANSWER OF THE  
COOS BAY WAGON ROAD COMPANY.

Filed May 21, 1897.

"This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, for replication thereunto sayeth that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or

effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly as in and by its said bill it has already prayed.

DANIEL R. MURPHY,  
Solicitor for Plaintiff."

DEMURRER TO THE REPLICATION TO THE  
ANSWER OF THE COOS BAY WAGON  
ROAD COMPANY.

Filed May 29, 1897.

"This defendant, The Coos Bay Wagon Road Company, by protestation, not confessing or acknowledging all or any of the matters and things in the said Complainant's Replication to its separate answer contained to be true, in such manner and form as the same are therein set forth, doth demur thereto, and for cause of demurrer, shows:

1.

That the matters therein set forth, as pleaded, do not constitute any cause of suit against this defendant nor constitute, in law, any replication to the new matter averred in the separate defense of the answer of this defendant to the Bill of Complaint, in the nature of a plea of purchase in good faith and for a valuable consideration.

2.

That said replication does not traverse or avoid any fact averred in said separate defense in the



answer of this defendant to the Bill of Complaint, but duly admits and confesses that every matter and thing therein contained is true; which said matters and things so averred in said separate defense in said answer constitute a good and complete defense to this suit, and a bar to any and all causes of suit against this defendant in said Bill of Complaint alleged, and to any and all relief therein sought against this defendant, and so this Court heretofore in this cause, has ruled and determined.

Wherefore, and for divers other defects appearing in said Complainant's said Replication, this defendant demurs and humbly demands the judgment of this Honorable Court whether it shall be compelled to proceed to trial upon any issue of fact in this cause; and prays to be hence dismissed with its reasonable costs in this behalf most wrongfully sustained.

E. B. WATSON,  
J. F. WATSON,  
B. B. BEEKMAN,  
Solicitors for Defendant."

ORDER SUSTAINING DEMURRER TO  
REPLICATION.

Filed June 5, 1897.

"Now, at this day, comes the plaintiff by Mr. Daniel R. Murphy, United States Attorney, and the defendants by Mr. E. B. Watson, of counsel, and thereupon, this cause comes on to be heard upon the demurrer of said defendants to the replication

filed herein, and was argued by counsel. On consideration whereof, it is now hereby ordered and adjudged that said demurrers be, and they are hereby sustained. And, thereupon on motion of said plaintiff, it is ordered that said plaintiff be, and it is hereby allowed ten days from this date in which to further plead herein."

#### ORDER DISMISSING GOVERNMENT'S BILL.

Entered June 21, 1897.

"Now, at this day, comes the plaintiff herein by Mr. Charles J. Schnabel, Assistant United States Attorney, and the defendants herein by Mr. B. B. Beekman, of counsel, and, thereupon, it appearing to the Court that the demurrer of said defendants to the replication herein has been sustained by the Court, on motion of said defendants, it is ordered, adjudged and decreed that said Bill of Complaint herein be, and the same is hereby dismissed."

The complainant introduced in evidence the opinion of Judge Bellinger in case No. 2406, being same as Defendant's Exhibit No. 243, which opinion is in words and figures as follows, to-wit:

*"In the Circuit Court of the United States for the  
District of Oregon.*

THE UNITED STATES OF AMERICA,

Complainant,

vs.

THE COOS BAY WAGON ROAD COMPANY,

Defendant.

John H. Hall for the United States.

Watson & Beekman for the Defendant.

Bellinger, J.

This a suit by the United States to cancel patents heretofore issued for lands alleged to have been erroneously patented under a grant for a wagon road from Coos Bay to Roseburg, in this State, and to recover their value where such lands have been sold by the defendant company. It is claimed that the lands in question are outside the indemnity limits of the grant, and are therefore not subject to it. A further object of the suit is to cancel a patent issued under the grant to lands occupied by a homesteader, one Samuel C. Braden, whose settlement was begun in 1869, and who has continuously since then resided on and cultivated the tract so occupied, and has in all respects complied with the homestead laws of the United States with respect thereto.

That the lands alleged to be outside the limits of the grant are in fact so, is shown by the maps and plats of the government surveys in evidence. It is claimed on behalf of the defendant that this question is one of fact, and that the action of the Land Department in patenting the lands has the con-

clusive effect of a judgment in respect thereto. This question was heretofore presented in this case upon demurrer to the bill of complaint, and the conclusion reached that the Land Department cannot enlarge the limits of a grant of lands by issuing patents thereunder for lands lying outside the boundary fixed by the act itself. 89 Fed. 151. That decision is final so far as this Court is concerned.

Upon the trial the defendant offered in evidence the record of a decree dismissing the bill of complaint, heretofore entered in this Court, in a suit between the same parties and relating to the same land. The hearing was upon a demurrer to a general replication. The decree was rendered upon the assumption that the facts were undisputed and after a statement by counsel, in which both sides were agreed, that the case was within the rule applied in the case of the *United States v. The Dalles Military Road Company and California and Oregon Land Company* (143 U. S. 31), as to the conclusive effect of a determination by an officer where full jurisdiction over a subject has been vested in him by a statute of the United States.

It goes without saying that there is no such thing as a demurrer to a general replication. Such a replication is a mere formal matter, and has the effect to put the case at issue, and there can be thereafter no judgment without a trial of the question of fact so presented. The general replication was in proper form, the form adopted in *Story's Equity Pleadings*; and if it had been otherwise, and



liable to objection, nevertheless there could be no decree dismissing the bill on that account. I am of the opinion that the decree attempted to be pleaded is a nullity; but if it is not a nullity, it is clearly not a decree upon the merits, and is for that reason not a bar to this suit.

All the questions in the case except that relating to the former adjudication are fully considered in the opinion heretofore rendered on the demurrer to the Bill of Complaint. 87 Fed. 151.

There must be a decree as prayed for canceling the patents mentioned in the complaint, except as to such lands as have been sold by the defendants, for which the United States is entitled to recover at the rate of one dollar per acre.

(Endorsed) U. S. CIRCUIT COURT,

Filed Aug. 7, 1901,

J. A. Sladen, Clerk, District of Oregon.

Whereupon the defendant introduced in evidence Judgment Roll in the case of the United States of America against The Coos Bay Wagon Road Company, in the Circuit Court of the United States for the District of Oregon, being Defendant's Exhibit No. 243, which, omitting formal parts, in words and figures is as follows:

### COMPLAINT

Filed August 25, 1897.

"To the Honorable the Judges of the Circuit Court of the United States for the District of Oregon—  
Sitting in Equity:

The United States of America, by Joseph McKenna, its attorney general, brings this its amended bill of complaint by leave of the Court first had and obtained, as against the above named defendants, the Coos Bay Wagon Road Company, a corporation duly incorporated under and by virtue of the general laws of the State of Oregon and a citizen of said State and District, and complaining says:

Par. 1.

That on the 3rd day of March, 1869, the Congress of the United States passed an Act granting to the State of Oregon, to aid in the construction of a Military Wagon Road from the navigable waters of Coos Bay to Roseburg, in the State of Oregon, the alternate sections of public land designated by odd numbers to the extent of three sections in width, on each side of said road; and said Act provided for the right of indemnity for losses sustained within the original grant to the extent of six miles on either side of the line of said road, and said Act further provided that the lands granted should not exceed three sections per mile for each mile of road actually constructed, and said Act further provided that said grant should not embrace any mineral lands of the United States, or any lands to which Homestead or Pre-emption rights are attached, and that all lands reserved or appropriated should be reserved from the operation of the Act.

Par. 2.

And your orator further shows unto your Hon-

ors that on the 22nd day of October, 1870, the Legislative Assembly of the State of Oregon passed an Act entitled "An Act Donating Certain Lands to the Coos Bay Wagon Road Company," which Act, after referring to the Act of Congress aforesaid, granted to the Coos Bay Wagon Road Company all lands, rights of way, rights, privileges, and immunities, granted or pledged to the State or Oregon by said Act of Congress aforesaid, for the purpose of aiding said Coos Bay Wagon Road Company in constructing the road mentioned and described in said Act of Congress aforesaid, and upon the conditions and immunities therein prescribed.

Par. 3.

And your orator further shows to your Honors that on the 18th day of June, 1874, the Congress of the United States passed an Act which, after reciting that certain lands had theretofore been granted by Acts of Congress to the State of Oregon, to aid in the construction of certain military wagon roads in said state, and that there was no existing law providing for the issuing of formal patents for said land, provided as follows:

'That in all cases when the roads, in aid of the 'construction of which said lands were granted, are 'shown by the certificate of the Governor of the 'State of Oregon as in said Acts provided to have 'been constructed and completed, patents for said 'land shall issue in due form to the State of Oregon 'as fast as the same shall, under said grants, be 'selected and certified, unless the State of Oregon

‘shall, by public act, have transferred its interests  
‘in said land to any corporation or corporations, in  
‘which case the patents shall issue from the General  
‘Land Office to such corporation or corporations,  
‘upon the payment of the necessary expenses  
‘thereof.’

Par. 4.

And your orator further shows unto your Honors, that on the 19th day of September, 1872, the Governor of the State of Oregon made and issued a certificate stating that the Coos Bay Wagon Road Company had constructed its road in accordance with the Act of Congress approved March 3rd, 1869, and with the Act of the Legislative Assembly of the State of Oregon, approved October 22nd, 1870.

Par. 5.

And your orator would further show unto your Honors, that on the 26th day of March, 1873, there was certified to said Coos Bay Wagon Road Company the Northwest  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of Section 25, Township 27, South Range 12 West of the Willamette Meridian.

Par. 6.

And your orator would further show unto your Honors, that on the 26th day of March, 1873, the President of the United States issued to the defendant, the Coos Bay Wagon Road Company, a patent for the following described lands, to-wit:

The S. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of Section 19; the North half of the N. E.  $\frac{1}{4}$ , the North half of the



N. W.  $\frac{1}{4}$ , the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , and the S. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of Section 29, and the West half of the N. W.  $\frac{1}{4}$  of Section 33, all in Township 25 South Range 12 West of the Willamette Meridian; and the West half of the N. W.  $\frac{1}{4}$  and the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of Section 5, and the N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  and the North half of the N. W.  $\frac{1}{4}$ , the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  and the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of Section 7, all in Township 26 South of Range 12 West of the Willamette Meridian.

Par. 7.

And your orator would further show unto your Honors, that on the 12th day of February, 1875, the President of the United States issued to the defendant, the Coos Bay Wagon Road Company, a patent for the following described lands, to-wit:

The N. W.  $\frac{1}{4}$ , the West half of the N. E.  $\frac{1}{4}$ , the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  and Lot one in Section 13, and the West half of the S. E.  $\frac{1}{4}$  and the S. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of Section one, all in Township 26 South of Range 13 West of the Willamette Meridian.

Par. 8.

And your orator would further show unto your Honors that on the .... day of January, 1869, Samuel C. Braden, a duly qualified Homestead Entryman under the laws of the United States of America, settled upon the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of Section 25, Township 27 South Range 12 West of the Willamette Meridian, with the intention of homesteading the same, and ever since said day of January, 1869, has continued to reside upon said

land and to cultivate and improve the same, and on the .... day of 189.., and within ninety days from the date of the filing of the township plat of the survey of said lands in the District Land Office at Roseburg, Oregon, the said Samuel C. Braden in good faith made application for filing a homestead covering said N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of said Section 25, Township 27 South Range 12 West of the Willamette Meridian, at the Roseburg Land Office in the State and District of Oregon.

Par. 9.

And your orator would further show unto your Honors that the following described lands, to-wit: S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$ , in Section 19, Township 25 South Range 12 West, 40 acres; the North half of the N. E.  $\frac{1}{4}$ , the North half of the N. W.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  and S. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  in Section 29, Township 25 South Range 12 West, 240 acres; the West half of the N. W.  $\frac{1}{4}$  of Section 33, Township 25 South Range 12 West, 80 acres; the West half, N. W.  $\frac{1}{4}$  and N. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$ , Section 5, Township 26 South Range 12 West, 113.31 acres; the N. W.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$ , North half N. W.  $\frac{1}{4}$ , S. W.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$ , and N. W.  $\frac{1}{4}$  S. W.  $\frac{1}{4}$ , Section 7, Township 26 South Range 12 West, 196.70 acres; the N. W.  $\frac{1}{4}$ , the West half N. E.  $\frac{1}{4}$ , N. W.  $\frac{1}{4}$  S. W.  $\frac{1}{4}$ , and Lot 1, Section 13, Township 26 South Range 13 West, 309.58 acres; the West half S. E.  $\frac{1}{4}$ , and S. E.  $\frac{1}{4}$  S. E.  $\frac{1}{4}$ , Section 1, Township 26 South Range 13 West, 130 acres, containing in all 1099.59 acres; lie entirely without the limits of the

grant to the said State of Oregon, subsequently granted to the defendant, the Coos Bay Wagon Road Company, by the said State of Oregon, by the Act of its Legislative Assembly as aforesaid.

Par. 10.

And your orator would further show unto your Honors that the Congress of the United States, by an Act entitled 'An Act to confirm pre-emption and homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the Land Department,' approved April 21, 1876, provided, among other things,

'That all pre-emption and homestead entries, or entries in compliance with any law of the United States of the public lands made in good faith by settlers upon tracts of land nor more than one hundred and sixty acres within the limits of any land grant prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local Land Office of the District in which such lands were situated, or after their restoration to market by order of the General Land Office and where the pre-emption and homestead laws have been complied with and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed and patents for the same shall issue to the parties entitled thereto.'

Par. 11.

And your orator further avers that the ministe-

rial officers of your orator acted erroneously and contrary to law in issuing patents for the said lands named and described to said Coos Bay Wagon Road Company under the facts as herein stated, and so your orator avers that said patents, in so far as the same purport to convey title to the lands herein described to said Coos Bay Wagon Road Company, are null and void, and that said lands, at the time of the issuance of said patents as aforesaid, were and now are of great value, viz.: of the value of more than \$2.50 per acre, and under the facts herein stated are the property of the complainant.

Par. 12.

And your orator further shows on information and belief that the defendant claims that it was and is entitled to the lands hereinbefore described under a proper construction of the grant, and that the lands should not be reconveyed nor their value paid to complainant.

Par. 13.

And your orator further alleges on information and belief that the defendant claims that it did not receive with these and other lands patented to it as much land as it was entitled to under a proper construction of the grant.

Par. 14.

And your orator further shows on information and belief that the defendant, the Coos Bay Wagon Road Company, claims to have sold some of the lands hereinbefore described.



## Par. 15.

And your orator would further show unto your Honors that on account of the complexity of the matters to be inquired into your orator is entirely remediless according to the strict rules of the common law, and for the purpose of avoiding a multiplicity of suits your orator brings this suit in this Court, where matters of this character are property cognizable and relievable.

For as much, therefore, as your orator can have no adequate relief except in this Court, and to the end, therefore, that said defendant may (complainant hereby waiving the necessity of the answer of said defendant being put in under the oath of said defendant) to the best and utmost of its respective knowledge, remembrance and belief, full, true, direct and perfect answer make to each of the several interrogatories hereinafter numbered and set forth as by the note hereunder written it is required to answer, that is to say:

1st. Whether any of the lands described herein have been sold.

2nd. What are the particulars of such sales, if sales were had?

3rd. How were the lands sold, for cash or on deferred payments; to whom were the lands sold; when were they sold, and for what consideration?

4th. Were the lands, if sold, sold with or without covenants or warranty?

5th. If any of the lands were sold on deferred

payments state the particulars of contracts of such sales; what has been paid thereon, how much is still due, and when is the same payable.

And your orator prays for a construction of the grant and a decree defining the rights of the parties in view of the grant and the proceedings thereunder.

And your orator prays also that the moneys received by the defendant for any of the lands described herein sold, be declared to be the moneys and property of the United States, and a decree that they are held in trust by defendant for the complainant, and that such money, to the extent of \$2.50 per acre for the lands erroneously taken, be paid to complainant, and that the lands not sold by defendant be declared lands of the United States, and the patents thereto be decreed to be null and void, and that your orator shall have such other and further relief as the case may require and as shall seem meet to the Court and as shall be agreeable to equity and good conscience.

And may it please your Honors to grant unto your orator a writ of subpoena of the United States of America directed to the said Coos Bay Wagon Road Company commanding it to appear and answer unto this bill of complaint, but not under oath (answer under oath being hereby expressly waived), and to abide and perform such order and decree in the premises as to the Court shall seem

meet and be required by the principles of equity and good conscience.

JOSEPH McKENNA,  
Attorney General of the United States.

DANIEL R. MURPHY,  
United States Attorney for Oregon.

By CHAS. J. SCHNABEL,  
Assistant U. S. Attorney."

**"INTERROGATORIES FOR THE EXAMINATION OF THE ABOVE NAMED DEFENDANT IN ANSWER TO THE COMPLAINANT'S BILL OF COMPLAINT.**

1st. Whether any of the lands described herein have been sold.

2nd. What are the particulars of such sales, if sales were had?

3rd. How were the lands sold, for cash or on deferred payments; to whom were the lands sold; when were they sold, and for what consideration?

4th. Were the lands, if sold, with or without covenants or warranty?

5th. If any of the lands were sold on deferred payments state the particulars of contracts of such sales; what has been paid thereon, how much is still due, and when is the same payable.

NOTE: The defendant, the Coos Bay Wagon

Road Company, is required to answer all of the interrogatories.

JOSEPH McKENNA,  
Attorney General of the United States.

DANIEL R. MURPHY,  
United States Attorney for Oregon.

By CHAS. J. SCHNABEL,  
Asst. U. S. Attorney.

Endorsed: Filed Aug. 25, 1897.

J. A. SLADEN,  
Clerk U. S. Circuit Court,  
District of Oregon."

## DEMURRER TO THE BILL OF COMPLAINT.

Filed October 6, 1897.

"The defendant, the Coos Bay Wagon Road Company, by protestation, not confessing or acknowledging all or any of the matters and things in the said Complainant's Bill contained to be true, in such manner and form as the same are therein set forth, does demur thereto and for cause of demurrer shows:

### I.

That said complainant has not by said bill stated any case within the equitable jurisdiction of this Court.

### II.

That it does not appear by said bill that complainant has not a plain, speedy, and adequate remedy at law.



III.

That said complainant has not in any by said bill made or stated such a cause as does or should entitle it to any relief as is thereby sought and prayed for, from or against this defendant.

IV.

That it appears by said bill that the complainant is without equity in the premises, and is not entitled to any relief.

V.

That it appears by said bill that the complainant has been guilty of gross laches.

VI.

Said bill contains no allegation or statement sufficient to constitute an amended bill.

E. B. WATSON,  
B. B. BEEKMAN,  
Solicitors for Defendants."

ORDER OVERRULING DEMURRER.

Entered Aug. 25, 1898.

"This cause was heard upon the demurrer to the bill of complaint herein, and was argued by Mr. John H. Hall, United States Attorney, and by Mr. E. B. Watson, of counsel for the defendant. On consideration whereof, it is now here ordered and adjudged, that said demurrer be, and the same is hereby, overruled.

And, thereupon, on motion of said defendant, it is ordered, that the defendant be, and it is hereby,

allowed thirty days from this day, in which it may answer or otherwise plead to the bill of complaint herein."

ANSWER OF COOS BAY WAGON ROAD  
COMPANY.

Filed September 8, 1898.

"The answer of the Coos Bay Wagon Road Company, defendant, to the bill of complaint of the United States of America, Complainant.

This defendant saving and reserving to itself all, and all manner of benefit and advantage of exception, which can or may be had or taken to the said complainant's bill of complaint for answer thereto, or to so much thereof as this defendant is advised is in anywise material or necessary for it to make answer unto, answers and says:

That it admits it is a corporation, duly incorporated under and by virtue of the general laws of the State of Oregon and a citizen of said state and district.

Admits: That on the 3d day of March, 1869, the Congress of the United States passed an Act granting to the State of Oregon, to aid in the construction of a Military Wagon Road from the navigable waters of Coos Bay to Roseburg, in the State of Oregon, the alternate sections of public land designated by odd numbers to the extent of three sections in width on each side of said road; and that said Act provided for the right of indemnity for losses sustained within the original grant to the

extent of six miles on either side of the line of said road; and said Act further provided that the lands granted should not exceed three sections per mile for each mile of road actually constructed, and said Act further provided that said grant should not embrace any mineral lands of the United States, or any lands to which homestead or pre-emption rights had attached, and that all lands reserved or appropriated should be reserved from the operation of the Act.

Admits: That on the 22nd day of October, 1870, the Legislative Assembly of the State of Oregon passed an Act entitled 'An Act Donating Certain Lands to the Coos Bay Wagon Road Company,' which Act, after referring to the Act of Congress aforesaid, granted to the Coos Bay Wagon Road Company, all lands, rights of way, rights, privileges and immunities, granted or pledged to the State of Oregon, by said Act of Congress aforesaid, for the purpose of aiding said Coos Bay Wagon Road Company in constructing the road mentioned and described in said Act of Congress aforesaid, and upon the conditions and immunities therein prescribed.

Admits: That on the 18th day of June, 1874, the Congress of the United States passed an Act which after reciting that certain lands had therefore been granted by Acts of Congress to the State of Oregon to aid in the construction of certain military wagon roads in said State, and that there was no existing law providing for the issuing of formal patents for said land provided as follows: 'That in

all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the Government of the State of Oregon as in said Acts provided, to have been constructed and completed patents for said land shall issue in due form to the State of Oregon as fast as the same shall under said grants be selected and certified unless the State of Oregon shall by public Act have transferred its interests in said land to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations, upon the payment of the necessary expenses thereof.'

Admits: That on the 19th day of September, 1872, the Governor of the State of Oregon made and issued a certificate stating that the Coos Bay Wagon Road Company had constructed its road in accordance with the Act of Congress approved March 3d, 1869, and with the Act of the Legislative Assembly of the State of Oregon approved October 22, 1870.

Admits: That on the 26th day of March, 1873, there was certified to said Coos Bay Wagon Road Company the Northwest  $\frac{1}{4}$  of the Southwest  $\frac{1}{4}$  of Section 25, Township 27, South Range 12 West of the Willamette Meridian.

DENIES: That on the 26th day of March, 1873, the President of the United States issued to the defendant Coos Bay Wagon Road Company a patent for the S. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of Section 19; the North half of the N. E.  $\frac{1}{4}$ , the North half of the N. W.  $\frac{1}{4}$ , the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  and the S. W.



$\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of Section 29, and the West half of the N. W.  $\frac{1}{4}$  of Section 33, all in Township 25, South Range 12 West of the Willamette Meridian, and the West half of the N. W.  $\frac{1}{4}$ , and the N. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of Section 5, and the N. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  and the North half of the N. W.  $\frac{1}{4}$ , the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  and the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of Section 7, all in Township 26, South of Range 12, West of the Willamette Meridian, or any portion thereof further or otherwise than that a certified list of said lands was that day issued by the Land Department of the United States to said Coos Bay Wagon Road Company, and afterwards on the 12th day of February, 1875, the President of the United States issued to said Coos Bay Wagon Road Company a formal patent therefor.

Admits: That on the 12th day of February, 1875, the President of the United States issued to the defendant, the Coos Bay Wagon Road Company, a patent for the N. W.  $\frac{1}{4}$ , the West half of the N. E.  $\frac{1}{4}$ , the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  and Lot 1, in Section 13, and the West half of the S. E.  $\frac{1}{4}$  of Section 1, all in Township 26, South of Range 13, West of the Willamette Meridian.

Denies. That the President of the United States on the 12th day of February, 1875, or any other time, issued to the defendant, the Coos Bay Wagon Road Company, a patent for the S. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of Section 1, Township 26, South of Range 13, West of the Willamette Meridian.

Admits: That on the . . . . day of January, 1869, Samuel C. Braden, a duly qualified Homestead entryman, under the laws of the United States of America settled upon the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of Section 25, Township 27, South Range 12 West of the Willamette Meridian, with the intention of homesteading the same, and ever since said day of January, 1869, has continued to reside upon said land and cultivate and improve the same, and on the . . . . day of . . . . ., 189., and within ninety days from the date of the filing of the township plat of the survey of said lands in the District Land Office at Roseburg, Oregon, the said Samuel C. Braden in good faith made application for filing a homestead covering said N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of said Section 25, Township 27, South Range 12 West of Willamette Meridian at the Roseburg Land Office in the State and District of Oregon.

Denies: That the S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  in Section 19, Township 25, South Range 12 West, 40 acres; the North half of the N. W.  $\frac{1}{4}$ , S. E.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  and S. W.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$ , in Section 29, Township 25, South Range 12 West, 240 acres; the West half of the N. W.  $\frac{1}{4}$  of Section 33, Township 25, South Range 12 West, 80 acres; the West half, N. W.  $\frac{1}{4}$  and N. W.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$ , Section 5, Township 26, South Range 12 West, 113.31 acres; the N. W.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$ , North half N. W.  $\frac{1}{4}$ , S. W.  $\frac{1}{4}$ , N. W.  $\frac{1}{4}$  and N. W.  $\frac{1}{4}$  S. E.  $\frac{1}{4}$ , Section 7, Township 26, South Range 12 West of Willamette Meridian, 196.70 acres; the N. W.  $\frac{1}{4}$ , the West half N. E.  $\frac{1}{4}$ , N. W.  $\frac{1}{4}$

S. W.  $\frac{1}{4}$ , and Lot 1, Section 13, Township 26, South Range 13 West, 309.58 acres; the West half S. E.  $\frac{1}{4}$  and S. E.  $\frac{1}{4}$  S. E.  $\frac{1}{4}$ , Section 1, Township 26, South Range 13 West, 130 acres, containing in all 1099.59 acres, or any portion thereof, lie entirely, or at all without the limits of the grant to the said State of Oregon, subsequently granted to the defendant, the Coos Bay Wagon Road Company, by the said State of Oregon by the Act of its Legislative Assembly as aforesaid.

Admits: That the Congress of the United States by an Act entitled 'An Act to confirm Pre-emption and Homestead entries of public lands within the limits of railroad grants in cases where such entries have been made under the regulations of the Land Department,' approved April 21, 1876, provided among other things, 'That all Pre-emption and Homestead entries, or entries in compliance with any law of the United States of the public lands made in good faith by settlers upon tracts of land nor more than one hundred and sixty acres within the limits of any land grant prior to the time when notice of the withdrawal of the land embraced in such grant was received at the local Land Office of the district in which such lands were situated, or after the restoration to market or order of the General Land Office and where the Pre-emption and Homestead laws have been complied with and proper proofs thereof have been made by the parties holding such tracts or parcels they shall be con-

firmed and patents for the same shall issue to the parties entitled thereto.

Denies: That the ministerial or other officers of the United States of America acted erroneously or contrary to law in issuing patents for the said lands named and described or any of them to said Coos Bay Wagon Road Company under the facts as stated in the bill of complaint, or otherwise.

Denied: That said patents, or any of them, in so far as they purport to convey title to said lands, or any of them, to said Coos Bay Wagon Road Company are null and void.

Admits: That said lands at the time of the issuance of said patents as aforesaid, were and now are of great value, and that they are now of the value of over \$2.50 per acre.

Denies. That at the time of the issuance of said patents as aforesaid, said lands were of the value of \$2.50 per acre or of any greater value than \$1.00 per acre.

Denies: That under the facts stated in the bill of complaint, or otherwise, said lands, or any of them, are the property of the United States of America.

Admits: That defendant claims that it was and is entitled to the lands described in the bill of complaint under a proper construction of the grant, and that the lands should not be reconveyed nor their value paid to complainant.

Admits: That defendant claims that it did not



receive with those and other lands patented to it as much land as it was entitled to under a proper construction of the grant.

Admits: That the defendant, the Coos Bay Wagon Road Company claims to have sold some of the lands described in the bill of complaint.

Denies: That the United States of America, complainant herein, is entirely or at all remediless according to the strict rules of the Common Law, or that a resort to equity is necessary to avoid a multiplicity of suits or action. And this defendant to the best and utmost of its knowledge, remembrance and belief to the first interrogatory propounded in the bill of complaint answers and says: That all the lands described therein, except the S. E.  $\frac{1}{4}$  of S. E.  $\frac{1}{4}$  of Section 1, Township 26, South of Range 13, West of the Willamette Meridian, containing 40 acres, have been sold.

And to the second interrogation propounded therein, answers and says: That said lands were sold with other lands derived by it from said grant amounting altogether to 87,405.18 at the price of \$1.00 per acre.

And to the third interrogation propounded therein answers and says: Said lands were sold for cash to John Miller, May 31, 1875, and for the consideration of \$1.00 per acre and in the aggregate \$1139.59.

And to the fourth interrogation propounded therein answers and says: Said lands were sold without covenants of warranty.

And to the fifth interrogation propounded therein answers and says: Said lands were not sold on deferred payments and the entire consideration has been paid. And this defendant to so much of the bill of complaint as seeks a cancellation of the patents alleged therein to have been issued to it by the President of the United States on the 26th day of March, 1873, or the patent issued to it by the President of the United States on the 12th day of February, 1875, for the lands therein described, or any of them, or any accounting for the proceeds of such portion of said lands as may have been sold by it, or any other relief against it by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein set forth, answers and says:

That prior to and at the time of the passage of the Act of Congress of March 3, 1869, making the grant to the State of Oregon to aid in the construction of the Military Wagon Road from the navigable waters of Coos Bay to Roseburg, Oregon, alleged in the bill of complaint, all of the lands described therein were public lands of the United States, upon none of which had any Homestead or Pre-emption entry been made or applied for at the Land Office for the district in which the same were situated, located at Roseburg, Oregon, and were subject to disposal by the Land Department of the United States, and the same continued to be public lands of the United States subject only to the rights

accruing under said grant, until the patents were issued therefor to this defendant on the 12th day of February, 1875, as alleged in the bill of complaint, and within the power of said Land Department to dispose of the same, that said lands were all selected by this defendant as inuring to it under said grant, under the instructions and directions of said Land Department, and in accordance with a diagram prepared by said Land Department and furnished to this defendant, representing said lands as lying within the limits of said grant, and said patents when issued to this defendant contained a description of said lands and recited that the same were within the three and six miles limits of said grant, as the case might be.

That this defendant prior to the issuance of said patents to it as aforesaid, paid the United States of America a valuable and adequate consideration for said lands, and other lands described therein and conveyed thereby, in constructing and completing said Military Wagon Road from the navigable waters of Coos Bay to Roseburg, Oregon, a distance sixty-two and one-half miles, in accordance with the provisions and upon the conditions expressed in said grant, and accepted and recorded said patents, and thereupon and thereafter assumed and exercised dominion and ownership of said lands until the 31st day of May, 1875, when it sold and conveyed the same to John Miller at the price of \$1.00 per acre, placing confidence in the correctness and regularity of the actions of said Land Department,

approving the selections of said lands and issuing said patents therefor, and in the truth of the recitals therein that said lands lay within the limits of said grant, and fully believing the same; and at or before the respective times of the payment of said consideration, and accepting and recording said patents and selling and conveying the same to said John Miller. This defendant had no notice whatever that said lands or any of them lay without the limits of said land grant, or were subject to any Homestead or Pre-emption right, or that the ministerial, or any officers of the United States had acted erroneously or contrary to the law in approving the selections of said lands as inuring under said grant, or in issuing said patents therefor under the facts stated in the bill of complaint, or otherwise, or of any defect whatever in the title to said lands, or any of them, and was and is a purchaser of all said lands in good faith and for a valuable and adequate consideration. And this defendant to so much of the complainant's bill of complaint as seeks a cancellation of the patents issued by the President of the United States to this defendant for any of the lands described therein, or the restoration of said lands to the complainant, or an accounting for the proceeds of the sales of any of said lands by this defendant, or other relief, this defendant answers thereto and says: That heretofore on the 29th day of February, A. D. 1896, the United States of America as complainant filed its bill of complaint in this Honorable Court against the Coos Bay Wagon



Road Company (this defendant), the Southern Oregon Company, Corenz Vogl, John Vogl, Mathias Vogl, W. S. Hamilton, Mary Mork, Charlotte H. Elliott, Frederick Elliott, John Weaver, John Norman and C. C. Bonebrake as defendants, to cancel and annul the patents issued by the President of the United States to this defendant mentioned and described in its present bill and to restore the lands therein described to it, and stating the same grounds of suit, claiming the same rights and interests in said lands and praying relief against this defendant in the same manner and for the same matters, and to the same effect, except as to an accounting for the proceeds of any of said lands sold by this defendant as the said complainant now prays by its said present bill and containing every allegation and every prayer for relief in its said present bill, except for such accounting for the proceeds of any of said lands sold by this defendant, and none other; and this defendant appeared and put in its answer to said former bill, and thereby made the same admissions, denials and averments and defense of purchase in good faith and for a valuable consideration and stating the same facts as hereinabove set forth, none other, and made the same issue; and the same complainant excepted to said separate defense for insufficiency, and the same after hearing at the April term of Court in the year 1897 was overruled and denied by this Honorable Court; and thereupon said complainant filed a General Replication to said answer, and this defendant demurred

thereto, which demurrer, after argument and on the 3d day of June, 1897, during said term, sustained by this Honorable Court, and said complainant omitting and refusing to further reply or plead to said answer, and on motion of this defendant on the 21st day of June, 1897, and during said term, a decree was duly rendered and entered by this Honorable Court dismissing said former bill, which decree was upon the merits and against any right of said complainant to have any of said patents canceled or any of said lands restored to it, and in favor of this defendant as a purchaser of said lands in good faith and for a valuable and adequate consideration, and fully established the rights of this defendant to said lands under said patents, free from all claims of said complainant thereto, or to the proceeds of any sale thereof and determined every issue in this suit, and has never been appealed from, or changed in any manner, but has become and is final and irreversible, and is still in full force and effect; all of which matters and things this defendant avers and pleads in bar to so much of the complainant's present bill of complaint as hereinbefore particularly mentioned, as well as to the whole thereof. And to so much of the complainant's bill of complaint as seeks an accounting from this defendant for the proceeds of the lands described therein sold by it, or a decree therefor against it for such amount, this defendant further answers and says: That soon after the receipt of the proceeds of the sale of said land, and on or

about the 31st day of May, 1875, having no knowledge or notice whatever that said lands, or any of them lay without the limits of said grant, or that said patents, or any of them, had been issued therefor erroneously, or contrary to law, or of any defect in its title to said lands, this defendant paid and distributed to its several stockholders as dividends all of the proceeds of the sales of said lands, amounting to the sum of \$1139.59, and has not since had and has not now any portion of said moneys or proceeds in its possession, or under its control, and has lost all recourse on said stockholders for any sum it may be compelled to pay to the complainant on account thereof.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said bill charged; without this, that there is any other matter, cause, or thing in the said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and evaded, or denied, is true to the knowledge or belief to this defendant; and which matters and things, this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

E. B. WATSON,

B. B. BEEKMAN,

Solicitors for Defendant."

REPLICATION

Filed October 19, 1898.

The replication of John H. Hall, Attorney of the United States for the District of Oregon, who for the United States, in this behalf, prosecutes to the answer of defendant :

This replicant, who prosecutes for the United States in this behalf, saving and reserving all, and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereto, for the said United States, saith, that he will aver and prove the said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said Coos Bay Wagon Road Company is uncertain, untrue, and insufficient to be replied unto by this replicant; without this, that any other matter or thing whatsoever in the same contained, material or effectual in the law to be replied unto, confessed and avoided, traversed and denied, is true; all which matters and things this replicant, for the said United States, is and will be ready to aver and prove, as this Honorable Court shall direct; and humbly prays, as in and by his said bill he hath already prayed.

JOHN H. HALL,  
United States Attorney  
for the District of Oregon.



DECREE.

Entered August 7, 1901.

THE UNITED STATES OF AMERICA,

Complainant,

vs.

THE COOS BAY WAGON ROAD COMPANY,

Defendant.

This cause having heretofore come regularly on for trial, the plaintiff appearing by Mr. John H. Hall, United States Attorney, and the defendant appearing by Mr. E. B. Watson, of counsel, and the Court having heard the evidence adduced, and the arguments of counsel, took the same under advisement, and the Court being now fully advised as to the law and the facts herein, finds the allegations of the plaintiff's bill of complaint to be true.

IT IS THEREFORE CONSIDERED, ADJUDGED, AND DECREED, that the certification and patent heretofore issued by the United States to the defendant, to the Northwest quarter of the Southwest quarter of Section 25, Township 27 South, of Range 12 West of the Willamette Meridian, be annulled and cancelled, and that Samuel C. Braden be decreed to be the equitable owner of said tract of land.

IT IS FURTHER ORDERED AND DECREED that said complainant recover of and from said defendant the sum of \$1099.59, said sum being the value of 1099.59 acres of land, described in plaintiff's bill of complaint, which lie outside of the lim-

its of the grant of lands to defendant, described in plaintiff's bill of complaint, and that complainant recover of and from the defendant its costs and disbursements of this suit.

CHARLES B. BELLINGER, Judge.

It is further certified that the following is a description and designation of the different exhibits certified up under the Order of Court and stipulation of the parties, and for that reason said exhibits are not printed herein :

# CLAIMANT'S EXHIBITS.

No.	Description.	Page.	Disposition.
1	Certified copy of certain documents filed in case of Wm. W. Crapo and Prosper W. Smith v. M. J. Kinney and Joseph Simon .....	10	Filed
2	Receipts, March 17, 1902, and August 1, 1912, Prosper W. Smith to M. J. Kinney.....	13	Copied
3	Photograph of house of W. A. Johnson .....	1000	Filed
4	Photograph of property of W. A. Johnson .....	101	"
5	Photograph of field of W. A. Johnson .....	102	"
6-11	Land Office Plats.....	141	"
12	Photograph of farm of Richard Haughton .....	249	"

530 *United States vs. Southern Oregon Company*

No.	Description.	Page.	Disposition.
13	Letter Dec. 8, 1894, Elijah Smith to Richard Haughton.	265	Filed
14	Photograph of house of M. J. Krantz .....	368	"
15	Photograph of barn of M. J. Krantz .....	368	"
16	Photograph of barn of M. J. Krantz .....	368	"
17	Photograph of cleared land of M. J. Krantz.....	368	"
18	Photograph of field of M. J. Krantz .....	368	"
19	Photograph of residence of W. H. Harmon .....	452	"
20	Photograph of barn of W. H. Harmon .....	452	"
21	Photograph of house of Wm. A. Johnson .....	370	"
22	Application typical of appli- cations filed by McKnight & Seabrook .....	474	Copied
23-37	Photographs taken at various points along Coos Bay Wagon Road .....	953-959	Filed
38	Lease Book S. O. Co., from which pages 64, 65, 66 and 67 and read in testimony....	1172	Read

No.	Description.	Page.	Disposition.
39	Lists showing amount of money received and amount paid out on acct. chittam bark, 1885-1910 inc.....	1178	Copied
40	Cash book O. S. I. Co., from which have been copied items on pages 11, 21, 103, 105 .....	1180	"
41	Minute book O. S. I. Co. from which the following have been copied .....	1182	"
	Meeting Board of Directors June 14, 1884, p. 42.....	1182	"
42	Agreement between Coos Bay Wagon Road Co. and W. H. Besse, Sept. 15, 1883, and supplementary agreement Nov. 3, 1883.....	1185	"
43	Letter Dec. 14, 1914, C. R. Smith to C. J. Smyth.....	1218	Filed
44	Certified copy articles of incorporation Coos Bay Wagon Road Co.....	1218	"
45	Certified copy supplemental articles of incorporation Coos Bay Wagon Road Co..	1219	"
46	Certified copy supplemental articles of incorporation Coos Bay Wagon Road Co..	1219	"



No.	Description.	Page.	Disposition.
47	Certified copy of disclaimer of Chas. Crocker et ux. running to Wm. H. Besse.....	1219	Filed
48	Certified copy of deed Coos Bay Wagon Road Co. to John Miller .....	1219	"
49	Certified copy deed Coos Bay Wagon Road Co. to John Miller .....	1219	"
50	Certified copy of deed John Miller to Collis P. Hunting- ton et al.....	1220	"
51	Certified copy of deed Collis P. Huntington et al. to Chas. Crocker .....	1220	"
52	Certified copy articles of in- corporation O. S. I. Co.....	1220	"
53	Certified copy deed Chas. Crocker et ux. to Wm. H. Besse .....	1220	"
54	Certified copy deed Wm. H. Besse et ux. to Russell Gray.	1220	"
55	Certified copy deed Russell Gray to O. S. I. Co.....	1220	"
56	Certified copy deed Coos Bay Wagon Road Co. to Wm. H. Besse .....	1221	"
57	Certified copy deed Wm. H. Besse to O. S. I. Co.....	1221	"

No.	Description.	Page.	Disposition.
58	Certified copy deed Geo. H. Durham, Master, to Wm. W. Crapo and Wm. J. Rotch...	1221	Filed
59	Certified copy deed W. J. Rotch et al. to Southern Oregon Company .....	1221	"
60	Certified copy List No. 3 selections by Coos Bay Wagon Road Company .....	1221	"
61	Certified copy List No. 2 selections by Coos Bay Wagon Road Company .....	1221	"
62	Certified copy List No. 1, selections by Coos Bay Wagon Road Company .....	1222	"
63	Certified copy List No. 2, selections by Coos Bay Wagon Road Company .....	1222	"
64	Certified copy List No. 3, selections by Coos Bay Wagon Road Company .....	1222	"
65	Certified copy List No. 4, selections by Coos Bay Wagon Road Company .....	1222	"
66	Certified copy List No. 5, selections by Coos Bay Wagon Road Company .....	1223	"

No.	Description.	Page.	Disposition.
67	Certified copy indemnity List No. 1, selections by Coos Bay Wagon Road Company.....	1223	Filed
68	Certified copy supplement to indemnity List No. 1, selec- tions by Coos Bay Wagon Road Co. ....	1223	"
69	Certified copy patent to Coos Bay Military Wagon Road Company .....	1223	"
70	Certified copy patent to Coos Bay Military Wagon Road Company .....	1223	"
71	Certified copy patent to Coos Bay Military Wagon Road Company .....	1224	"
72	Certified copy patent to Coos Bay Military Wagon Road Company .....	1224	"
73	Certificate of Corporation Commissioner of Oregon re- garding name "Coos Bay Military Wagon Road Co.".	1224	"
74	Certified copies of papers transmitted by Coos Bay Wagon Road Co. to Commis- sioner G. L. O.....	1224	"
75	Letter April 14, 1886, Elijah Smith of Jas. Webster.....	1225	Copied

No.	Description.	Page.	Disposition.
76	Letter-press copy book O. S. I. Co., from which following letters are copied .....1227 May 6, 1887, P. W. Smith to John L. Howard.....1228 May 18, 1885, Elijah Smith to W. P. Metcalf.....1228 June 17, 1887, Elijah Smith to C. A. Dolph.....1232 (Telegram) June 11, 1884, statement of payments for Coos Bay & Roseburg Wagon Road Co. land .....1242		
77	Letter Jan. 12, 1885, Elijah Smith to W. P. Metcalf.....1230		Copied
78.	Letter Jan. 30, 1885, W. P. Metcalf to Elijah Smith....1231		"
79	Letter Oct. 7, 1886, P. W. Smith to Jas. Webster.....1232		"
80	Letter July 30, 1885, W. P. Metcalf to Elijah Smith....1233		"
81	Copies of minutes of Board of Directors O. S. I. Co., June 28, 1883.....1236		"
82	Minutes of stockholders' meet- ing O. S. I. Co., June 26, 1884 .....1238		"



536 *United States vs. Southern Oregon Company*

No.	Description.	Page.	Disposition.
83	Minutes of meeting Board of Directors Oregon Southern Improvement Co., July 10, 1884 .....	1239	Copied
84	Journal of Southern Ore. Co., from which is copied entries on page 1.....	1243-1244	"
85	Letter Dec. 30, 1914, C. R. Smith to C. J. Smyth.....	1249	Filed
86	Photographic copy of letter May 21, 1897, Daniel R. Murphy, U. S. Attorney, to Jas. McKenna, Attorney General .....	1250	"

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DEFENDANT'S EXHIBITS.

No.	Description.	Page	Disposition.
1	Copy of Land Office plat showing entries .....	507	Filed
2	Copy of Land Office plat showing entries .....	508	"
3-14	Copy of Land Office plat showing entries .....	508	"
15-52	Cruises of Wagon Road grant lands in Douglas Co.	660	"
53-176	Blue prints of cruises prepared by Coos County.....	848	"

*United States vs. Southern Oregon Company* 537

No.	Description.	Page.	Disposition.
177	Assessment Roll, Coos County .....	662	Filed
178-189	Cruises of Wagon Road grant lands in Douglas Co.	953	"
190	Certified copies of certificates, etc., relating to completion of Coos Bay Wagon Road .....	963	"
191	Patent No. 1 issued to Coos Bay Wagon Road Co.....	964	"
192	Patent No. 2 issued to Coos Bay Wagon Road Co.....	964	"
193	Patent No. 3 issued to Coos Bay Wagon Road Co.....	964	"
194	Patent No. 4 issued to Coos Bay Wagon Road Co.....	964	"
195	Letter from letter press book dated April 30, 1885, W. P. Metcalf to Elijah Smith...	966	Copied
196	Letter from letter press copy book, dated June 16, 1885, W. P. Metcalf to P. W. Smith .....	968	"
197	Letter from letter press copy book, dated Nov. 18, 1885, James Webster to Elijah Smith .....	968	"

538 *United States vs. Southern Oregon Company*

No.	Description.	Page.	Disposition.
198	Letter dated September 27, 1883, W. H. Besse to Wm. Rotch .....	970	Copied
199	Certified copy complaint and answer in re Southern Ore- gon Co. v. W. A. Johnson..	971	Filed
200	Letter dated April 10, 1884, S. F. Chadwick to Wm. Rotch, Treasurer .....	971	Copied
201	Letter dated December 15, 1885, S. F. Chadwick to Elijah Smith, containing enclosure copy of letter J. F. Watson to Chadwick...	973	"
202	Letter dated January 2, 1886, S. F. Chadwick to Elijah Smith .....	976	"
203	Letter dated July 3, 1885, S. F. Chadwick to Elijah Smith .....	977	"
204	Letter dated February 6, 1885, W. H. Besse to S. F. Chadwick .....	979	"
205	Letter dated June 10, 1887, C. A. Dolph to Elijah Smith .....	980	"
206	Original stock book O. S. I. Co. ....	983	Filed

No.	Description.	Page.	Disposition.
207	Abstract of title to lands of Southern Oregon Co.....	984	Filed
208	Key to Abstract of Title, Exhibit 207 .....	985	"
209	Letter August 12, 1886, Hazard & Wilson to John L. Howard .....	985	Copied
210	Copy of letter July 28, 1886, Wm. A. J. Sparks, Commissioner G. L. O., to Hazard & Wilson .....	987	"
211	Letter June 19, 1886, Hazard & Wilson to John L. Howard .....	989	"
212	Copy of letter May 28, 1886, Asst. Comm. G. L. O. to Hazard & Wilson.....	992	"
213	Letter August 5, 1886, Hazard & Wilson to John L. Howard .....	993	"
214	Letterpress copy book Southern Oregon Co. from which following letters are copied:	995	
	June 20, 1887, Elijah Smith to C. A. Dolph.....	996	
	July 1, 1887, Elijah Smith to C. A. Dolph.....	998	
	July 1, 1887, Elijah Smith to Geo. W. Loggie.....	996	



No.	Description.	Page.	Dispo- sition.
	July 25, 1887, P. W. Smith to C. A. Dolph.....	999	
	June 30, 1887, Rotch and Mandell Trustees to C. A. Dolph .....	1000	
	August 15, 1887, Crapo and Rotch, Bondholders Com- mittee, to holders First Mortgage Bonds O. S. I. Co. ....	1001	
	September 5, 1887, P. W. Smith to J. M. Merrill....	1001	
	October 7, 1887, P. W. Smith to C. A. Dolph.....	1002	
	November 5, 1887, P. W. Smith to Chas. W. Plum- mer .....	1002	
	November 25, 1887, P. W. Smith to W. W. Crapo....	1003	
	January 14, 1888, Elijah Smith to Geo. W. Loggie..	1004	
	March 19, 1888, P. W. Smith to John L. Howard.....	1005	
215	Letterpress copy book O. S. I. Co. from which following are copied:	1006	
	List of stockholders O. S. I. Co. June 12, 1884.....	1007	

No.	Description.	Page.	Disposition.
	Statement of payments for C. B. & R. W. lands.....	1009	
	Trial balance stock ledger August 7, 1884.....	1010	
	Letter May 24, 1887, P. W. Smith to Barnabas Holmes	1012	
216	Certified copy records Board of Land Commissioners of Oregon showing disposition of school sections.....	1013	Filed
217	Letter from letterpress copy book April 14, 1885, W. P. Metcalf to Elijah Smith...	1027	Copied
218	Map showing wagon road lands and bottom lands....	1039	Filed
219	Letter March 9, 1886, Hazard & Wilson to John L. How- ard, opinion on Abstract of Title .....	1052	Copied
220	Letter April 5, 1886, Hazard & Wilson to John L. Howard .....	1059	"
221	Letter Jan. 1, 1886, Hazard & Wilson to John L. Howard .....	1062	"
222	Letter April 6, 1886, Hazard & Wilson to John L. Howard .....	1063	"

542 *United States vs. Southern Oregon Company*

No.	Description.	Page.	Disposition.
223	List of Stockholders of O. S. I. Co. June 12, 1884.....	1066	Copied
224	Minutes of meeting of Board of Directors O. S. I. Co., July 10, 1884.....	1068	"
225	Bondholders' agreement in re conference O. S. I. Co.....	1112	"
226	Request of Bondholders upon Trustees to take possession of property .....	1116	"
227	Bondholders' agreement in- demnifying Elijah Smith..	1117	"
228	Copy of Defendant's Exhibit 225 with exception of date and signatures .....	1118	"
229	Certificate of destruction of bonds .....	1119	"
230	Certificate of destruction of bonds .....	1120	"
231	Letter Oct. 13, 1886, C. A. Dolph to James Webster..	1120	"
232	Letter June 2, 1887, Elijah Smith to C. A. Dolph.....	1121	"
233	Letter June 6, 1885, E. P. Mast to W. P. Metcalf....	1131	"
234	Lease book Southern Oregon Company .....	1188	Filed
235	Cash book O. S. I. Co.....	1188	"
236	Ledger O. S. I. Co.....	1188	"

No.	Description.	Page.	Disposition.
237	Articles of incorporation Southern Oregon Co.....	1189	Copied
238	Stock book Southern Oregon Company .....	1194	Filed
239	Letter Sept. 27, 1883, Wm. H. Besse to Wm. Rotch....	1195	Copied
240	Certified copy of pleadings and judgment in re U. S. vs. Coos Bay Wagon Road Co. ....	1248	Filed
241	Certified copy of pleadings and judgment in re U. S. vs. Coos Bay Wagon Road Co., et al., No. 2284....	1248	"
242	Certified copy of pleadings and judgment in re U. S. vs. Coos Bay Wagon Road Co., et al., No. 2283....	1248	"
243	Certified copy of pleadings and judgment in re U. S. vs. Coos Bay Wagon Road Co., No. 2406.....	1249	"
244	Certified copy letter Nov. 11, 1870, Aaron Rose to Com- missioner G. L. O., with cer- tified copy of map of defi- nite location .....	1255	"

The paging above refers to the paging of original testimony as taken by examiner.



Whereupon, the appellant Southern Oregon Company now presents and tenders to the Court its Statement of the Evidence prepared and to be filed herein under and pursuant to Rule 75 of the Rules of Practice for Courts of Equity of the United States, and respectfully asks the Court to approve the same and to make such order in relation thereto as is required by law and the said rule.

SOUTHERN OREGON COMPANY,  
By Dolph, Mallory, Simon & Gearin, its Attorneys.

Whereupon, on March 4th, 1916, said Court made and entered in said cause an order approving said statement as follows :

Now at this day this cause came on to be heard upon the application of the appellant Southern Oregon Company, defendant, for an order approving the Statement of the Evidence prepared and tendered by the appellant and now tendered to be filed herein under Rule 75, Rules of Practice for the Courts of Equity of the United States, the appellant appearing by its attorneys, Dolph, Mallory, Simon & Gearin and John M. Gearin, and the complainant appearing by its attorneys, Clarence L. Reames and Constantine J. Smyth, special assistants to the Attorney General of the United States, and it appearing to the Court that the parties were unable to agree as to the reduction of so much of said testimony to narrative form in the Statement of the Evidence as it is set out by question and answer therein, and it appearing to the Court that the evi-

dence in said cause has been reduced and stated in narrative form in said Statement of the Evidence other than that the said evidence set out by question and answer, and it further appearing to the Court that in its judgment the testimony of the witnesses thus set out by question and answer should be reproduced in the exact words as reported and stated in said Statement of the Evidence, and it further appearing to the Court that the Statement of the Evidence as thus prepared is true, complete and properly prepared, as provided by said Rule 75 of the Rules of Practice for the Courts of Equity of the United States, and there is no objection to the approval of said Statement of the Evidence by the Court:

It is ordered that the said Statement of the Evidence now tendered to be filed and thus prepared be and the same is hereby approved and the same is now directed to be filed in the Clerk's office of this Court as of this date, and becomes a part of the record for the purposes of the appeal.

And the Court being of the opinion that the original exhibits in this cause should be inspected in the Appellate Court upon appeal,

It is further ordered that all the original exhibits in this cause be sent with the record on appeal to the Clerk of the Circuit Court of Appeals.

CHAS. E. WOLVERTON, Judge.

Filed March 4, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 4th day of March, 1916, there was duly filed in said Court, a Praecipe for Transcript, in words and figures as follows, to wit:

PRAECIPE FOR TRANSCRIPT.

*In the District Court of the United States for the  
District of Oregon.*

No. 3701.

UNITED STATES OF AMERICA

vs.

SOUTHERN OREGON COMPANY.

*To the Clerk of the above entitled Court:*

Please prepare and have printed in accordance with law and the rules of the Court, the transcript of record on appeal in the above entitled cause and include in said transcript the following record:

Bill of complaint.

Demurrer to bill and order thereon.

Answer.

The several replications.

The opinion of the Court on the merits.

Petition for rehearing and order thereon, if any.

Final decree.

Statement of the evidence.

Petition for appeal.

Assignment of errors.

Order allowing appeal.

Bond on appeal.

Citation on appeal.

Praecipe for transcript.

And also transmit to the United States Circuit Court of Appeals for the Ninth Circuit, with the said transcript all of the original exhibits in said cause as directed by the order of the above entitled Court.

DOLPH, MALLORY, SIMON & GEARIN,

Attorneys for Defendant.

Filed March 4, 1916. G. H. Marsh, Clerk.



UNITED STATES OF AMERICA, }  
District of Oregon, } ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that the foregoing printed record constitutes the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered in the District Court of the United States, for the District of Oregon, in the case in which the United States of America is complainant and appellee, and the Southern Oregon Company is defendant and appellant. That the said transcript has been prepared by me in accordance with the law, the rules of the Court, and the praecipe for transcript filed in said cause by said appellant, and that the said transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is \$                      for printing said transcript, and that the same has been paid by said appellant.

In testimony whereof, I have  
hereunto set my hand and  
affixed the seal of said Court  
at Portland in said District  
this                      day of March, 1916.

Clerk.

---

IN THE  
**United States Circuit Court of Appeals**  
NINTH CIRCUIT.

---

SOUTHERN OREGON COMPANY,  
*Defendant and Appellant.*

v.

UNITED STATES OF AMERICA,  
*Complainant and Appellee.*

---

**COMPLAINANT'S BRIEF OF THE LAW.**

---

CONSTANTINE J. SMYTH,  
*Special Assistant to the Attorney General.*



## I.

# OUTLINE OF ARGUMENT.

Explanatory Note .....	1
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## PART I.

### Argument.

I. PERTINENT RULES OF CONSTRUCTION.....	2
(1) Act of Congress is more than a conveyance. It is a law .....	2
(2) In construing public grants, all doubts must be resolved in favor of the grantor.....	2
(3) Presumption against a construction which would render a statute ineffective, etc.....	2
(4) Language of act must control, unless meaning thereof leads to absurdity.....	2
(5) Rules of statutory construction employed to resolve, but never to create, doubts.....	3
(6) When searching for meaning of act, the policy of Congress at the time it was passed may be considered	3
II. THE RESTRICTIVE PROVISIO IS ENFORCIBLE.....	4
III. THE WAGON ROAD COMPANY WAS SUBSTITUTED FOR THE STATE.....	11
(a) The substitution authorized.....	11
(b) The assent of the Company.....	13
(c) Not a sale.....	15
(d) There was no waiver.....	16
(e) Under no circumstances would the Wagon Road Company have the right to convey the land in a body	18
IV. BREACHES OF THE PROVISIO BY THE WAGON ROAD COMPANY, AND THE KNOWLEDGE OF THE DEFENDANT AT THE TIME IT PURCHASED.....	19
(a) Sales unauthorized by the grant.....	19
(b) Knowledge of the breaches by the defendant.....	19
V. EQUITY HAS JURISDICTION OF THIS CAUSE.....	21



## II.

### PART II.

#### Affirmative Defenses.

VI.	THE ACTION IS NOT BARRED.....	22
	(a) Waiver does not apply.....	22
	(b) Mere silent acquiescence in breaches of a condition never constitutes waiver of either the breaches or the condition .....	23
	(c) The mere waiver of breaches of a condition will not constitute a waiver of the condition itself.....	23
	(d) Constructive notice is ineffectual.....	23
	(e) Statutes of limitations.....	24
	(1) Action not barred by section 391 of Lord's Oregon laws .....	24
	(2) Nor by the congressional acts of March 3, 1891, or March 2, 1896.....	24
	(f) No ratification .....	24
	(g) Effect of the issuance of the patents.....	26
	(h) Adverse possession .....	26
	(i) The government is not estopped.....	27
VII.	THE RESTRICTIVE PROVISIO IS NOT REPUGNANT TO THE GRANT .....	30
	(a) The act analyzed.....	30
	(b) Defendant's authorities on this point.....	32
VIII.	THE CONDITION SUBSEQUENT IS NOT IMPOSSIBLE OF PERFORMANCE .....	34
	(a) The law .....	34
	(b) Lands sold without effort.....	35
	(c) The Wagon Road Company discouraged purchasers..	36
	(d) The lands taken off the market.....	36
	(e) Character of the land.....	38
	(f) The intention of Congress.....	43
	(g) The law with respect to impossible conditions.....	46
	(h) Other pertinent observations by the Supreme Court	47
IX.	THE DEFENDANT DECLARES THAT ALL QUESTIONS HEREIN INVOLVED ARE RES JUDICATA BE- CAUSE OF THE DECISIONS IN CERTAIN CASES PLEAD IN THE ANSWER.....	47

### III.

(a) Theory of earlier suits inconsistent with the theory of this suit .....	48
(b) Questions decided in earlier cases, different.....	49
(c) Different cause of action here.....	51
X. DEFENDANT IS NOT A BONA FIDE PURCHASER FOR VALUE .....	54
(a) Burden of proof on defendant.....	54
(b) Knowledge of the Wagon Road Company.....	55
(c) Knowledge of the purchasers intermediate the Wagon Road Company and defendant.....	56
(1) Notice of the granting act.....	56
(2) The recitals of the patents.....	56
(3) Recorded instruments—what they show.....	57
(d) The defendant's knowledge.....	58
(1) Implied from the records.....	58
(2) Defendant admits knowledge.....	59
XI. NO EQUITIES IN FAVOR OF DEFENDANT.....	60
(a) Alleged inequitable conduct on part of Government	60
(b) Alleged opinion of eminent counsel.....	63
(c) Mr. Mallory's opinion.....	65
(d) Opinion that title was defective.....	65
(e) Defendant's claim that it believed the title to be valid	65
(1) Another reason why defendant did not believe the title good.....	67
(2) Theory on which defendant purchased.....	68
(f) Cost of wagon road.....	68
(g) Alleged advantage of the road to the public.....	70
(h) Toll collected .....	71
(i) Alleged expenses on account of the land.....	71
(j) Injurious effect of the policy pursued.....	74
(k) Knowledge of present owners.....	75
(l) Supreme Court decision.....	77
XII. THE DEFENDANT URGES THAT LIMITATIONS ON THE RIGHT OF SALE CANNOT BE ENFORCED WHERE GRANT IS TO THE STATE.....	78
CONCLUSION .....	80
TABLE OF CASES CITED.....	82



**IN THE**  
**United States Circuit Court of Appeals**  
**NINTH CIRCUIT.**

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SOUTHERN OREGON COMPANY,  
*Defendant and Appellant.*

v.

UNITED STATES OF AMERICA,  
*Complainant and Appellee.*

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**COMPLAINANT'S BRIEF OF THE LAW.**

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**Explanatory Note.**

This brief is divided into two chief parts—(a) the propositions by the Government; (b) the affirmative defenses of the defendant. Pages I, II and III, *ante*, contain an outline of the argument. In the back of the brief is a list of decisions and other authorities cited. For the testimony we refer to appellee's brief of the facts, and indicate it by the letters "B. F." in parenthesis.



**PART I.****GOVERNMENT'S AFFIRMATIVE PROPOSITIONS.  
ARGUMENT.****I.****PERTINENT RULES OF CONSTRUCTION.**

(1) An act of Congress making a grant is more than a mere conveyance. It is a law as well. (Oregon & California R. R. Co., et al., v. United States, 35 S. C. R., 920-2. Missouri, etc., R. R. Co. v. Kansas Pacific, 97 U. S., 491-497).

(2) In construing public grants, such as the one under consideration, all doubts must be resolved in favor of the grantor (United States v. Oregon & California R. R. Co., et al., 186 Fed., 861-893; Winona v. Barney, 113 U. S., 618, 625; Oates v. National Bank, 100 U. S., 239, 244).

(3) There is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or even inconvenience (Bird v. United States, 187 U. S., 118, 124).

(4) The language of the act must be permitted to control, unless the plain meaning thereof leads to results so absurd as to force the conviction that Con-

gress could not have intended them (*United States v. Oregon & California R. R. Co., et al.*, 186 Fed., 861-892; *Kohlsaat v. Murphy*, 96 U. S. 153, 160).

(5) Rules of statutory construction are employed to resolve, but never to create, doubts (*Hamilton v. Rathbone*, 175 U. S., 414; *McCluskey v. Cromwell*, 11 N. Y., 601; *Lewis' Sutherland Statutory Construction*, Vol. 2, pp. 698-702, and cases cited).

(6) When searching for the meaning of an act, the policy of Congress at the time it was passed may be considered.

At the time when the granting act in this action was passed, it was the fixed policy of Congress not to make any grants of the public domain without requiring the grantee to sell the land in quantities not to exceed 160 acres to one person and at a price not to exceed \$2.50 per acre. This policy was expressed in what is known as the Julian Amendment.

None of the grants in aid of internal improvements prior to the passage of this act, March 3, 1869, contained any provision restricting the sale of the land either as to character of purchaser, quantity, or price, except that, prior to 1850, most of the grants provided that the lands should not be sold for less than double the minimum Government price, the only abuse of the grants then anticipated by Congress being the squandering of the lands at insignificant prices. The manner in which the Pacific railroad grants had been handled, the scandal attending the matter, and the public indignation thereby aroused, caused a general discussion of

land grants in Congress before and at the time the Act in suit was passed. The Julian Amendment came out of this discussion, and crystalized the policy of Congress. This policy may be considered in ascertaining the meaning of the Act now before the court, if there should be any doubt about it (United States v. Oregon & California R. R. Co., et al., 186 Fed., 861, 894; United States v. Union Pacific, 91 U. S., 72, 79; Platt v. Union Pacific, 99 U. S., 48, 64; Smith v. Townsend, 148 U. S., 490, 494; Mobile Ohio R. R. Co. v. Tennessee, 153 U. S., 486, 502).

## II.

### THE RESTRICTIVE PROVISIO IS ENFORCIBLE.

The chief controversy in this case turns upon the meaning of the following proviso in the granting act:

*Provided, further, That the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section, and for a price not exceeding two dollars and fifty cents per acre (B. F. 2).*

For convenience, we speak of this throughout the brief as the "restrictive proviso."

Defendants allege in the answer that this proviso "is merely a non-enforcible direction or request as to the future disposition of the lands" (B. F. 24).

This is in effect the contention that was made by

the defendants in the *Oregon & California* case, and which was denied by the Supreme Court. The restrictive provisos in that case are as follows (these are two, substantially alike, however):

*And provided further*, That the lands granted by the Act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.

The last requires the lands to be sold to "actual settlers," the first does not. In other respects they are in effect the same.

Speaking of the provisos in the *Oregon & California* case the Supreme Court said: "They are covenants and enforceable" (p. 920).

The appellant asserts that there is a distinction between the provisos in that case and the one in the case at bar—that "The settlement of the country and not the building of the road was the paramount purpose of the grant" in the *Oregon & California* case, but that "no such claim can be made here" (Brief p. 16). The Supreme Court did not so hold. What it did say on that point is this:

We shall be led into error if we conclude that because the railroad is attained it was from the beginning an assured success, and that it was a *secondary* and not a *primary* purpose of the acts of congress. \* \* \* But such success had not been achieved when the grant of 1866 was made, nor in full measure when the acts of 1869 and 1870 were passed, and it may be conceded that they were



intended to continue and complete such national purpose and that it was of the first consideration, but the *secondary* purpose was regarded and provided for in the provisos under review (p 918. Italics ours).

In other words, the building of the road was the primary purpose, and the populating of the country only secondary.

The opinion in other places makes it clear that the proviso is free from ambiguity and easily understood. It says in the opening sentence:

A direct and simple description of the case would seem to be that it presents for judgment a few provisions in two acts of Congress which neither of themselves nor from the context demand much effort of interpretation or construction (p. 916). Again, the judgment of the court is to be:

Determined by the *simple* words of the acts of Congress, not only regarded as grants but as laws, and accepted as both; granting rights, but imposing obligations. Rights quite definite, obligations as much so (p. 925. Italics ours).

Speaking of the duty of the court with respect to the provisos it observes:

We can only enforce the provisos as written, not relieve from them.

And of the duty of the defendants to obey them it remarked that—

Whatever the difficulties of performance, relief could have been applied for, and it might have been secured through an appeal to congress. Certainly

evasion of the laws or the defiance of them should not have been resorted to (p. 925).

In response to the contention that the character of the lands excused the defendants from obedience to the provisos, the court said:

The character of the lands furnished no excuse. It might have justified non-action, but it did not justify antagonistic action (p. 922).

Again, speaking upon the same subject:

If but little of the land was arable, most of it covered by timber and valuable only for timber and not fit for the acquisition of homes, if a great deal of it was nothing but a wilderness of mountain and rock and forest \* \* \* if the grants were not as valuable for sale or credit as they were supposed to have been and difficulties beset both uses,—the remedy was obvious. Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law. They were neither cause nor justification for violating it (p. 920).

All this is pertinent here and answers every contention made by the appellant on the assumption that the land was not fit for the acquisition of homes, and therefore that the grantee was justified in disregarding the plain mandate of the law.

More need not be said. The decision of the Supreme Court puts it beyond doubt that the restrictive proviso means just what it says, and that it was the duty of the grantee to obey it.

Why the proviso does not contain the phrase “actual

settlers'' is explained by the following proceedings in Congress when the bill was pending:

The bill for the wagon road grant was introduced in the Senate. When it passed that body it did not have the restrictive proviso in any form.

In the House, Mr. Julian offered this amendment:

*Provided*, That the grant of lands hereby made shall be *upon the condition* that the lands shall be sold *to actual settlers only*, in quantities not greater than one quarter section, and for a price not exceeding \$2.50 per acre.

He then stated that the bill had not been considered in committee, but if the proposed amendment were accepted, he would not insist upon a reference of the bill to the Public Lands Committee.

Mr. Mallory, Representative from Oregon, who had charge of the measure, made a statement in favor of the bill. A motion to refer the bill to the Public Lands Committee was made and defeated. The bill then came before the House on the question of Mr. Julian's amendment. He modified the amendment by adding the words "to each person" after the words "quarter section," making the clause read "in quantities not greater than one quarter section to each person." *The amendment was then agreed to without objection, and in that form the bill was passed*, and the clerk of the House was ordered to report the action to the Senate and request its concurrence in the amendment.

Being the next to the last day of the session, the

matter was immediately communicated to the Senate without the usual precautions. It came up before that body within a short time on the same day. But in some manner the terms of the amendment were changed in the meantime, and it was reported to, and read in, the Senate as follows:

*Provided further,* That the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section and for a price not exceeding \$2.50 an acre.

The restriction as to actual settlers had been eliminated. The change was not discovered, and in the latter form the amendment was concurred in by the Senate, and in that form the bill was enrolled, signed by the President of the Senate and Speaker of the House, and approved by the President of the United States the next day, March 3, 1869.

Whether this change occurred through inadvertence or through improper influences can only be conjectured. The haste with which legislative matters are handled on the last two days of a session made either possible. But there is no doubt of the accuracy of the foregoing facts (Congressional Globe, third session Fortieth Congress, pp. 1798-1820).

The proceedings show that the amendment proposed by Mr. Julian was not offered because of any special policy peculiar to that grant, but in fulfillment of the general policy as to all grants. This is borne out by the proceedings concerning another grant on the same day, and within a few minutes after the proceed-



ings relating to the Coos Bay grant, when it was expressly stated that these amendments were offered pursuant to a general policy adopted by both Houses of Congress.

Upon the same day, March 2, 1869, Senate bill No. 679 came before the House for consideration. The object of this bill was to extend the time for the construction of a wagon road under the act of July 2, 1864 (13 Stat., 355).

Pursuant to the policy that had been adopted, the moment this bill came before the House, Mr. Julian moved the following amendment:

*Provided, That the grant of lands hereby renewed and continued shall be upon the condition that the lands shall be sold to actual settlers only, in quantities not greater than a quarter section and for prices not exceeding \$2.50 per acre.*

In support of his amendment, Mr. Julian said:

Mr. Speaker, the amendment which has been read by the clerk is a *provision which ought to be applied to every future grant of land and to every dead grant that seeks a revival at our hands.* \* \* \* The adoption of the amendment will not defeat the passage of the bill, for *the Senate, like the House, has repeatedly approved of the very condition prescribed in the amendment* (Cong. Globe, 3d Sess. 40th Cong., p. 1821).

### III.

#### THE WAGON ROAD COMPANY WAS SUBSTITUTED FOR THE STATE.

The Government claims that Oregon, by the act of October 22, 1870, substituted the wagon road company for itself as grantee under the grant. This, it says, is clearly shown by the circumstances surrounding the transaction. The legislative act recites verbatim the congressional granting act, and then provides in Section 1:

That there is hereby granted to the Coos Bay Wagon Road Company, all lands, rights of way, privileges, and immunities heretofore granted or pledged to this State by the Act of Congress in this act heretofore recited, for the purpose of aiding said company in constructing the road mentioned and described, in said Act of Congress, upon the *conditions and limitations therein prescribed* (B. F. 5) (Italics ours).

#### (a) The Substitution Authorized.

The state had a right to pass such an act, for in Section 6 of the Congressional act it is said:

That the United States Surveyor General for the district of Oregon shall cause said lands, so granted, to be surveyed at the earliest practicable period *after said State shall have enacted the necessary legislation to carry this act into effect* (B. F. 4) (Italics ours).

This contemplated that the Legislature should pass legislation to carry the act into effect. The character

of the legislation was left to the state, with, of course, this exception, that it must be in harmony with the terms of the grant, for it is not reasonable to say that Congress contemplated legislation which would be in disregard of its will. In all other respects, however, Oregon was permitted to proceed as it might think wise touching the matter. In pursuance of this authority, given to it by Congress, it passed the act of October 20, 1870, transferring the grant to the Wagon Road Company.

That Section 6 gave the state the right to transfer the land, is further supported by the Congressional act of 1874, which authorizes the issuance of patents to the state:

Unless the State of Oregon shall by public act, have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof.

This is a construction by Congress of the granting act (*Cope v. Cope*, 137 U. S., 682; *Tiger v. Western Investment Co.*, 221 U. S., 286). It proceeds upon the theory that the state had the right, under that act, to transfer the land. It cannot be said to be a ratification of the transfer, because the act says that it does not grant "any new rights," and a ratification would be in effect the creation of a new right, but it is a clear recognition of authority in the state to transfer the lands, and this authority could have come to it only from the granting act.

**(b) The Assent of the Company.**

The Coos Bay Wagon Road Company filed its articles of incorporation with the Secretary of State of Oregon on April 15, 1868. They provide that the corporation was formed to "locate, construct, and keep open for travel a clay and plank road from Coos Bay in Coos County, Oregon, to Douglas County, Oregon," and fixed its capital stock at \$40,000 (B. F. 26).

On January 31, 1870, by an amendment to its articles, the company provided that the contemplated road should extend from Coos Bay to Roseburg (B. F. 29), the points between which the road was finally constructed.

Shortly afterwards, the Commissioner of the General Land Office received from Mr. Aaron Rose, as president of the Wagon Road Company, a letter, in which this occurs:

Herewith I have the honor to transmit to you a copy of an "Act of the Legislative Assembly of the State of Oregon entitled 'An Act donating certain lands to Coos Bay Wagon Road Company'"; also transmit to you a map showing the survey and definite location of the road (B. F. 26).

On April 11, 1872, the Wagon Road Company again amended its articles of incorporation by inserting the following:

This corporation hereby assents to and accepts the grant of lands, right of way and all of the conditions and provisions of the Act of Congress approved March 3, 1869, entitled "An Act granting lands to the State of Oregon to aid in the con-



struction of a military wagon road from the navigable waters of Coos Bay to Roseburg in said State." And also of the Act of the Legislative Assembly of the State of Oregon, approved October 22, 1870, entitled "An Act donating certain lands to the Coos Bay Wagon Road Company." And also assents to and accepts all further acts of said Congress or of the Legislative Assembly of the State of Oregon granting lands or other property or things in aid of the construction of said road (B. F. 27).

The company, on the same day, further amended its articles of incorporation by stating that it was its purpose:

Also to organize, establish and maintain a system of emigration from other states and territories of the United States and from Europe to the State of Oregon (B. F. 27).

This recognizes the purpose of the "restrictive proviso," and evidences the intention of the company to comply with it by disposing of the lands in small quantities such as immigrants are accustomed to purchase.

The first list of selected lands was prepared by the company on March 22, 1873. It contains this:

"The Coos Bay Wagon Road Company under and by virtue of the Act of Congress entitled, 'An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg in said State, dated 3d of March 1869' and the Act of the Legislative Assembly of the State of Oregon approved 22d day of October, 1870, con-

veying said 'grant' to the Coos Bay Wagon Road Company \* \* \* hereby make and file the following list of selections of public lands claimed by said company as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of said Act of Congress."

In the oath of the land agent of the company to the aforementioned list, occurs this language:

I, A. R. Flint, being duly sworn, deposes and say that I am the land agent of the Coos Bay Wagon Road Company; that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by the said company as enuring to the State of Oregon to aid in the construction of the wagon road \* \* \* for which a grant of land was made by the *Act of Congress approved on the 3d of March, 1869* \* \* \* (B. F. 28) (Italics ours).

The company, therefore, undertook to do precisely what the state was to do in consideration of the grant; the state stepped out and the company stepped in (186 Fed. 887).

### **(c) Not a Sale.**

There is nothing in the transaction which savors of a sale within the meaning of the "restrictive proviso."

In *Williamson, et al., v. Berry*, 49 U. S., 495, 544, it is said:

We remark that "sale" is a word of precise legal import, both at law and in equity. It means at all times a contract between parties, to give and

to pass rights of property for money,—which the buyer pays or promises to pay to the seller for the thing bought and sold.

Butler v. Thompson, 92 U. S., 412, quotes, with approval, the following definition from Benjamin on Sales:

To constitute a valid sale, there must be (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; (4) a price in money paid or promised (p. 415).

In the same opinion it is observed (p. 415) “if any one of the ingredients be wanting, there is no sale.”

Some of the “ingredients” are “wanting” in the transaction we are considering. There is no “mutual assent” to a sale, because there was no sale. Neither is there “a price in money paid or promised.”

#### **(d) There Was No Waiver.**

In its answer the defendant claims the transfer was a breach of the restrictive proviso, and that the government, by the Act of 1874, waived the breach. This is untenable. The act interprets itself when it says:

*Provided, That this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled.*

To waive the restrictive proviso would be to create a new right in the grantee, for it would thereby give to the grantee what it did not have before, viz: the right to dispose of the land without any restrictions. But the act says pointedly that it is not "to create any new rights of any kind."

Moreover, it is the law that a waiver:

*Must, to be effectual, not only be made intentional, but with knowledge of the circumstances* This is the rule when there is a direct and precise agreement to waive the stipulation. *A fortiori* is this the rule when there is no agreement either verbal or in writing to waive the stipulation, *but where it is sought to deduce a waiver from the conduct of the party* (Bennecks v. Insurance Co., 105 U. S., 355, 359; United States v. Oregon & California R. R. Co., et al., 186 Fed. 861).

If Congress regarded the transfer as a violation, it is not thinkable it would have approved it. Congress is not accustomed to condone a violation of law. To contend that it did so in this case, is to argue that Congress deliberately and knowingly turned its back on one of its fixed policies—a policy it had established but five years before, after the most thorough consideration—namely, the policy of requiring the beneficiaries of a public grant like this, to sell in quantities of 160 acres, and at a price not to exceed \$2.50 per acre. Neither is it reasonable to suppose that if Congress intended to abrogate the restrictive proviso it would have done so by indirection, or by an act which declares its purpose to be not "to create any new rights of any kind."



**(e) Under No Circumstances Would the Wagon Road Company Have the Right to Convey the Land in a Body.**

During the oral argument below, inquiry was made as to whether the Wagon Road Company could have conveyed to Miller without violating the grant, if he had agreed to take the land subject to all the conditions and limitations of the granting act. We answer: no. The State of Oregon, as we have seen, was authorized by Section 6 of the granting act to make a transfer of the whole grant for the purpose of carrying the act into effect, but no other grantee was given this authority.

Congress, by the restrictive proviso, intended to prevent land monopoly. This could not be accomplished, if the land might be transferred in a body from one grantee to another. The granting act imposed upon the state the duty of selling the land. If it had not been for Section 6 there would have been no authority to make the transfer to the Wagon Road Company, but this authority was not extended by the section, or otherwise, to the Wagon Road Company. It was the intention of Congress that the state, or its authorized substitute, should break up the land into small tracts and sell at prices that would induce purchasers and settlers. In no other way could the Congressional policy of opposition to land monopoly be worked out (186 Fed. 894).

## IV.

## BREACHES OF THE PROVISIO BY THE WAGON ROAD COMPANY, AND THE KNOWLEDGE OF THE DEFENDANT AT THE TIME IT PURCHASED.

**(a) Sales Unauthorized by the Grant.**

The bill charges that the three conveyances by the Wagon Road Company, one of 35,534 acres on May 31, 1875, to John Miller, one of the wagon road on the same day to John Miller, and one of 61,143.37 acres on January 7, 1884, to William H. Besse, were in violation of the restrictive proviso. In addition, there were four other unlawful sales by the Wagon Road Company; 763 acres to J. M. Eberline on Dec. 6, 1873; 1,020 acres to Thomas J. Beals on Feb. 8, 1875 (Bill, Ex. "A," R. p. 36); 200 acres to Joseph J. Shook on Oct. 27, 1877, and 320 acres to R. M. Gurney on Jan. 24, 1881 (Bill, Ex. "G," R. p. 127). These transactions are all admitted by the answer (B. F. 14, 16).

**(b) Knowledge of the Breaches by the Defendant.**

The answer says that the defendant at the time it purchased had "no knowledge *other* than as disclosed by the records and legislation with reference to said lands" (B. F. 17, 18).

It also says:

That before purchasing defendant carefully examined all legislation by Congress and by the State of Oregon affecting the title to said lands

and made special inquiry concerning the same \* \* \* and, that before making said purchase the defendant carefully examined the patents for said land in said bill, described as No. 1, 2, 3 and 4 (B. F. 20).

The records, of course, disclosed that Congress was familiar with the character of the land at the time it passed the act; the terms of the congressional and state acts; the fact that the patents recited that they had emerged in pursuance of the granting act, and that many sales and conveyances had been made in violation of the act. In addition to all this the answer alleges:

That before making said purchase said defendant further prosecuted its search into the validity of the title to said lands and \* \* \* found and avers the fact to be as follows:

Then, commencing on page 169 and ending on page 178, the answer sets out 19 classes of information gathered in the search. These classes show violations of the grant, as well as other things.

More complete knowledge of the breaches complained of could not well exist, and it is all confessed by the defendant.

Apart from these admissions, the law would charge the defendant with all the knowledge which it concedes it had at the time of making the purchase; but when we couple constructive knowledge with actual knowledge the case is stronger, and convicts the defendant of deliberately purchasing a title which it knew its grantors had no right to sell, except in conformity with

the restrictive proviso. In the presence of this fact the defendant is certainly in no position to claim any special consideration at the hands of a court of equity.

## V.

### EQUITY HAS JURISDICTION OF THIS CAUSE.

Congress authorized the bringing of this action by the same joint resolution, approved April 30, 1908, by which it authorized the suit against the Oregon and California Railroad Company (B. F. 10).

The facts in this case with respect to possession of the land are similar to those in the latter case. In that case it appeared that the land was wild and unoccupied, with the exception of a few acres which had been rented by the defendant company. In this case the land is also wild and unoccupied, with the exception of 693 acres which were in the possession of tenants at the time the action was instituted (B. F. 35). In all other respects the two cases are exactly alike. Moreover, appellant concedes that equity has jurisdiction (Brief pp. 1-82).

In view of the foregoing considerations, the government is entitled to a decree, unless someone of the affirmative defenses presented by the defendant is tenable.



**PART II.****AFFIRMATIVE DEFENSES.****VI.****The Action Is Not Barred.**

The defendant pleads that the action is barred by waiver, acquiescence, laches, ratification, estoppel, adverse possession, the statute of limitations and certain other statutes referred to in the answer (B. F. 19). Most of the questions thus presented are disposed of in the Oregon & California case (35 S. C. R. 908). We state them separately.

**(a) Waiver Does Not Apply.**

Without knowledge of the right waived and an intention to relinquish it, there can be no waiver. This proposition was affirmed in the Oregon & California case (186 Fed. 888).

The facts in this case are the same as in that. There is no proof that notice of the breaches came to any representative of the government, except such as was received by the departments of the Interior and of Justice through the suits prosecuted by the government against the Coos Bay Wagon Road Company, Southern Oregon Company and others.

None of these suits were instituted prior to 1896—12 years after the defendant purchased (B. F. 83).

The proof fails to show that any notice of the violation was brought, in any form, to the attention of Congress before the introduction of the joint resolution authorizing the commencement of this suit. Knowledge on the part of any other body, or of any official of the government, would be ineffectual, because, as this court held in the Oregon & California case, Congress alone has the power to waive the restrictive proviso (186 Fed. 888).

**(b)** Mere silent acquiescence and breaches of a condition never constitutes waiver of either the breaches or the condition (Oregon & California case, 186 Fed. 888).

**(c)** The mere waiver of breaches of a condition will not constitute a waiver of the condition itself (Oregon & California case, *ib*; Hawkins v. United States, 96 U. S. 689; New York Indians v. United States, 170 U. S. 1; and Schulenberg v. Harriman, 88 U. S. 44).

**(d) Constructive Notice Ineffectual.**

Waiver, as we have seen, implies actual knowledge. It will never be presumed from constructive knowledge alone.

Besides, a party is never held to have constructive knowledge of instruments recorded *subsequent* to the passing of his own title (Oregon & California case, *ib*; A. & E. Enc. of Law, Vol. 24, p. 146; Rannels v. Rowe, 145 Fed. 296).

**(e) Statutes of Limitations.**

(1) It is said that section 391 of Lord's Oregon Laws bars this action. The right of the government to bring an action in its own courts, cannot be limited by any action of the State. This goes without saying.

(2) The effect of the congressional acts of March 3, 1891, and March 2, 1896, was passed upon in the Oregon & California case.

The facts here being the same as there, a like result must follow.

**(f) No Ratification.**

It is claimed by the defendant that the transfer from the State to the Wagon Road Company was a violation of the act, and that Congress, by the act of June 18, 1874, ratified this violation, and thereby waived and abandoned the restrictive proviso (B. F. 15). We have already discussed this question (*supra*, pp. 18, 19), but an additional word may not be amiss.

The act is entitled "An Act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases." When the bill was under debate in the Senate, the following occurred:

Mr. Edmunds: There ought to be a provision in that bill that this act shall not revive any land grant which has already expired, and providing that this bill shall create no new rights of any kind.

Senator Kelly from Oregon answered: I have no objection to such an amendment; but the bill only applies to roads already completed.

Thereupon Mr. Edmunds offered his amendment, which reads:

Provided, that this act shall not be construed to revive any land grants already expired, or to create any new rights of any kind.

Commenting upon the amendment, Senator Sargent said:

If you say "rights of any kind" there will be no effect in the bill. This bill gives the right to issue patents. There was an oversight in the original law by which it was not provided that any patent should issue although all the obligations required by the government should be complied with. I think the last words of this amendment are so sweeping that they would prevent the bill from having any effect at all.

Mr. Edmunds replied:

Then add "except to provide for issuing patents for lands to which the state is already entitled" (B. F. 29).

When the bill came up in the House, Mr. Willard of Vermont said:

I think that ought to go to the Committee on Public Lands.

Mr. Townsend replied:

The Committee on the Public Lands have examined this bill. It provides for nothing but



issuing patents for lands which have already been granted.

The bill was then passed (B. F. 30).

Now, note the language of the proviso of the act; "this shall not be construed \* \* \* to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled." Yet the defendant contends it creates another right, namely, the right to dispose of the land without reference to the restrictive proviso. Obviously this cannot be true.

#### **(g) The Effect of the Issuance of the Patents.**

The Secretary of the Interior before issuing the patents was not required to decide whether or not the act of the Oregon legislature of October 20, 1870, or any other act or transaction, whether by Oregon or by any person, formed a breach of the proviso in the granting act. He had no power to decide it, and did not attempt to do so.

Moreover, as was said by the Supreme Court in the Oregon & California case, this suit is one—

To enforce a continuing covenant. It is not a suit to vacate and annul patents (p. 922).

The issuance of the patents was, therefore, neither a ratification nor a waiver.

#### **(h) Adverse Possession.**

It does not require citation of any authorities to show that title cannot be acquired by adverse possession against the United States.

### (i) The Government Is Not Estopped.

The government is not estopped, except by an affirmative act of some authorized agent (Oregon & California case, 888).

The Supreme Court of the United States, speaking through Judge Brewer, has said, in effect, that estoppel exists only where the act is done by an executive officer, or agent, specially authorized by Congress (United State v. California & Oregon Land Company, 148 U. S. 31; United States v. W. V., etc., 54 Fed 807, 812).

*Failure* to act, then, does not constitute an estoppel against the government.

Outside of the passage of the act of 1874, and the issuance of patents in pursuance thereof, there is no affirmative act by any officer of the government with respect to the title. We have shown that this act did not justify the defendant, or any other person, in believing that the government had waived the restrictive proviso, or any other provision, of the granting act (*supra*, pp. 27, 29).

The claim of defendant upon this point, as stated in the answer, is that section 8 of the act of March 3, 1891, the act of March 2, 1896, both statutes of limitations, the decree in the suits referred to by the answer, and the failure to act sooner with respect to the breaches, constitute an estoppel. Neither the statutes nor the decrees warrant the claim (See *supra*, p. 27, and *infra*, p. 51). The failure to act is not, as we have just seen, ground of an estoppel. It belongs to the category

of laches, and the Supreme Court of the United States, overruling Judge Deady in the 42 Fed., 360, has declared that laches is not attributable to the government (*United States v. The Dallas M. R. Co.*, 140 U. S. 549; *United States v. Insley*, 130 U. S. 263; *Van Brocklin v. State of Tennessee*, 117 U. S. 151; *United States v. N. C. & St. L. Ry. Co.*, 118 U. S. 120; *Oregon & California case*, 888).

The defendant presented at the bar a number of decisions in support of its contention that the government is estopped (*U. S. v. Will. Val. & Cas. Wagon Road Co.*, 54 Fed. 807; *U. S. v. N. P. Railroad Co.*, 95 Fed. 864-880; *U. S. v. Clark*, 138 Fed. 294; *U. S. v. Budd*, 43 Fed. 630). We have examined them all, and find that none of them hold a different doctrine from that outlined above.

The Supreme Court of the United States in the *Oregon & California case* (35 S. C. R. 921-2) disposed of all the foregoing contentions.

In that case the same arguments were made that are made here with respect to waiver, acquiescence, laches, ratification, estoppel, and the statute of limitations, and they were all rejected. The court said:

It is contended that if sales were made under the limitations of the provisos, the breaches are acquiesced in, and for this the action and knowledge of the officers of the government are adduced, indeed the knowledge of Congress itself. \* \* \* And cases are cited which it is contended establish that such circumstances might work an estoppel even against the government which, when it appears in

court it is contended, is bound like other suitors, and certainly establishes that for more than forty years, in view of the executive officers, the provisos were not conditions subsequent. Granting their strength in that regard, granting they have some strength in every regard, they have not controlling force, considering the provisos as simple covenants. And they cannot be asserted as an estoppel. No one was deceived, at least no one should have been deceived. No action was or should have been induced by them that would plead ignorance of the provisions and immunity from their responsibility (p. 921).

Moreover :

We may observe again that the acts of Congress are laws as well as grants and have the constancy of laws as well as their command, and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company, based on waiver, acquiescence and estoppel, and even to the defense of laches and the statute of limitations (Id. 922).

In view of this language there is nothing left for discussion. No officer of the government has the right to waive the enforcement of a law, and the grant is a law. No officer of the government can do any act which will estop the government from enforcing a law. No officer of the government can do any act which will amount to an acquiescence in lawlessness so as to prevent the government from enforcing the laws whenever it thinks proper to do so. The grant is a law. By keeping this controlling fact in mind, all difficulties with respect to the questions now under review disappear.



## VII.

### THE RESTRICTIVE PROVISIO IS NOT REPUGNANT TO THE GRANT.

#### (a) The Act Analyzed.

There is nothing inconsistent in the granting act itself. At the bar below it was urged that there was, but this is unsound. The opening part of Section 1 grants the land to the State of Oregon to aid in the construction of a wagon road. The first proviso requires that the lands shall be exclusively applied to the construction of the road. The next proviso—the one containing the restrictions—makes it incumbent on the grantee to sell the lands in quantities not greater than one quarter section to one person and for a price not to exceed \$2.50 per acre. Following that are two provisos reserving mineral lands, homesteads, and per-emptions, from the grant.

Section 2 enacts that the lands shall be disposed of by the legislature for the purposes named in Section 1, and that the road provided for shall be and remain a public highway for certain uses of the government.

Section 3 says how the roads shall be constructed.

Section 4 gives authority to the grantee to select indemnity lands.

Section 5 declares that when ten continuous miles of the road are completed, not to exceed thirty sections

“may be sold,” and so on, from time to time, until the road shall have been completed; and if the road is not completed within five years, no further sales shall be made, and the lands remaining unsold shall “revert to the United States.” This is followed by a proviso that the lands granted shall not exceed three sections per mile for each mile constructed.

Section 6 imposes upon the Surveyor General the duty of surveying the lands “after said State shall have enacted the necessary legislation to carry this act into effect.”

The provision requiring the lands to be exclusively applied to the construction of the road is not inconsistent with the one restricting the sales to 160 acres to one person at a price not to exceed \$2.50 per acre. Both provisions can be obeyed. Neither is the provision of section 5 forbidding the sale of any land, before ten continuous miles of the road are completed, and prohibiting the sale of more than thirty sections for each ten miles thereof, inconsistent with any other part. It does not require that thirty sections *shall* be sold as each ten miles are finished, but provides that they “*may* be sold as each ten miles are finished.” This can be followed and the restrictive proviso obeyed to the letter.

The part of the act which says “that, if the road is not completed within five years, no further sale shall be made, and the lands remaining unsold shall revert to the United States,” presents nothing that is irreconcilable with the restrictive proviso. We appre-

hend the court will find no difficulty in reconciling that proviso with all the other provisions of the act.

**(b) Defendant's Authorities on This Point.**

A great many authorities are offered by the defendant to support its argument that the condition subsequent is repugnant to the grant. (*De Peyster v. Michael*, 6 N. Y. 467-492-493; *Madlebaum v. McDonnell*, 29 Mich. 77-97; *Anderson v. Carey*, 36 Ohio St. 506-575; *Case v. Devire*, 15 N. Y. 265-266; *Bennett v. Chapin*, Vol. 7 L. R. A. 377-381; *Latimer v. Waddell*, 3 L. R. A. 668-678 (26 S. E. 122); *Potter v. Couch*, 141 U. S. 315; *Scovil v. McMahan*, 21 L. R. A. 58; *Vandershie v. Hanks*, 3 Cal. 28-41; *Burnham v. Burnham*, 79 Wis. 557). A careful examination has failed to reveal that they aid this contention, even in the least. In the first place, they all deal with common law principles. They say that according to those principles, certain restrictions upon the power of alienation are repugnant to the grant. But of what force are common law principles when they come into conflict with an act of Congress? Congress may modify them or override them entirely (*Oregon & California case*, 883, 892; *Rutherford v. Greene*, 15 U. S. 196; *Lessieur v. Price*, 53 U. S. 59). If it has done so in this case, that does not make its act invalid.

Besides, the decisions in those cases, even on the theory that the common law applies to the action at bar, do not affect the question at issue here, if we are to take the following from *Potter v. Couch*, *supra*, as illustrative of the holdings in other cases. We quote:

But the right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised.

There is nothing “against *all* alienation” in the grant we are considering; on the contrary, the grant requires alienation.

In addition, the same argument was presented in the Oregon & California case and overruled by the Supreme Court. Stating the position of the defendants, the court said:

The conclusion is deduced that the actual settlers’ clauses, viewed even as covenants, were either impossible of performance or repugnant to the grants, and therefore void (p. 919).

Answering this, it gave a certain example, and then said of the provisos:

They are, it is true, cast in language of limitation and prohibition; the sales are to be made only to certain persons, and not exceeding a specified maximum in quantities and prices. If the language may be said not to impose ‘an affirmative obligation to people the country,’ it certainly imposes an obligation not to violate the limitations and prohibitions when sales were made (p. 920).

Again, speaking of certain contentions of the defendants, the court said that they would confine the restrictive provisos—



To the compulsion of sales of land susceptible of actual settlement, and assert that the evidence established that not all of the lands, nor indeed the greater part of them, have such susceptibility. But neither the provisos nor the other parts of the granting acts make a distinction between the lands, and we are unable to do so. The language of the grants and of the limitations upon them is general. We cannot attach exceptions to it (p. 920).

### VIII.

THE RESTRICTIVE PROVISIO IS NOT IMPOS-  
SIBLE OF PERFORMANCE, BUT IF IT BE,  
THAT FURNISHES NO JUSTIFICATION FOR  
ITS BREACH.

#### (a) The Law.

The defendant urges that it was impossible for the Wagon Road Company to comply with the restrictive proviso because of the character of the land; that the Wagon Road Company endeavored to do so, but was unable to find purchasers for tracts of 160 acres.

Many witnesses were called by defendant to testify with respect to the character of the lands. We objected, and still object, to the materiality of their testimony. No matter what the character of the land was, the grantee was bound to observe the restrictive proviso (*infra* 48).

“If the provisos were ignorantly adopted,” says the Supreme Court in the Oregon & California case,—

As they are asserted to have been; if the actual conditions were unknown, as is asserted; if but little of the land was arable, most of it covered with timber and valuable only for timber, and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest; \* \* \* the remedy was obvious. Granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law; they were neither cause nor justification for violating it (p. 920).

But the facts show that the restrictive covenant was not impossible of performance.

The testimony presented by the government on this subject is rebuttal. If the defendant's testimony is disregarded, then so should the government's be disregarded. But however that may be, the testimony on this point is overwhelmingly against the defendant.

#### **(b) Lands Sold Without Effort.**

During the five years preceding the transactions with Miller, the Wagon Road Company made 53 sales, embracing 6,963 acres, for a stated consideration of \$17,306.77. Only two of these sales were in violation of the grant. This is shown by Exhibit "A" attached to the bill, page 27, and admitted by the answer, page 3. No effort was required to make these sales.

J. A. Cotton, who lived in the neighborhood of the land for upwards of 36 years, testified on cross-examination "that he knew of no efforts on the part of the Coos Bay Wagon Road Company to sell."

If the company was able to make 53 sales without effort, it is but fair to say that if it had organized a land department; advertised its holdings and vigorously sought purchasers, thus serving one of its stated purposes of existence, viz., the encouragement of immigration, it could have disposed of all the lands in conformity with the grant.

**(c) The Wagon Road Company Discouraged Purchasers.**

Persons whom Dr. Hamilton, president of the company, sent upon the land subsequent to 1875, with the premises that if they would settle upon tracts of 160 acres, they would receive title at \$2.50 per acre, were all deceived. He kept his promises with none of them after the date of the Miller conveyance (B. F. 46 *et seq.*).

**(d) The Lands Taken Off the Market.**

The testimony is abundant and without contradiction that the Wagon Road Company, Oregon Southern Improvement Company and Southern Oregon Company took the lands off the market and refused to sell at the price fixed in the grant. In fact, they refused to sell at any price, except in very rare instances.

A. T. Siglin, who has resided in the neighborhood of the land since 1871, has been Treasurer and Sheriff of Coos County, therefore, thoroughly familiar with what was going on in the county, said that the land could have been readily disposed of, at least the larger

portion of it, if the owners had been willing to sell it within the terms of the grant, and that he knew, some years ago, of people very anxious to purchase (B. F. 54).

Twenty-two other witnesses testified to substantially the same thing.

George W. Loggie, who was manager of the Oregon Southern Improvement Company and the Southern Oregon Company for seven years, commencing in 1885, said, that President Elijah Smith forbid him to sell to anybody. In this he is supported by Robert E. Shine, bookkeeper, secretary and local manager from 1888 to 1911, and by Frank Batter, manager under Mr. Loggie (B. F. 46).

Then there are the 600 applicants who were refused (B. F. 48).

The foregoing establishes that the companies refused to sell the lands. No one denies this. What then becomes of the defense that the lands could not be sold?

Defendant offered Exhibit 216, a certificate from the Board of Land Commissioners of the State of Oregon, to show that lands belonging to the State, and within the limits of the grant were not sold. The purpose of this, we take it, is to show that, because the State did not sell, the Wagon Road Company could not sell. But why spend any time dealing in inferences, when we have the cold fact that neither the Wagon Road Company nor the defendant *would* sell when it



had opportunities to do so? A fact is better than a guess.

**(e) Character of the Land.**

However, the evidence does not sustain the contention that the character of the lands forbids settlement. There is some testimony that the hill lands taken alone are not fit for settlement, but the great weight of the testimony is to the effect that a very large percentage of the land is tillable. This is in accordance with the testimony of the best informed witnesses.

We take the following from the testimony of the witnesses named:

Miller, G. P.—Came to Douglas County in 1874; carried mail over the wagon road; the part of the land which could not be used for farming was suitable for fruit raising or grazing.

Loggie, George W.—Manager of the Oregon Southern Improvement Company and Southern Oregon Company for seven years; 60 per cent of the land could be cultivated after it was cleared, and 15 per cent in its natural condition; cost of clearing, \$60.00 to \$100.00 per acre. Had wide experience in clearing land.

Buell, A. S.—Resided on wagon road from 1870 to 1889; the bottom land would make fine agricultural land if cleared, and mountain land could be used for grazing after the removal of the timber.

Siglin, A. T.—Resided in Douglas County since 1870, formerly deputy collector of customs; county

treasurer and sheriff; estimated that 90 per cent of the land was susceptible of raising crops or fruits, and 10 per cent worthless.

Fitzgerald, John—Resided near wagon road since 1871; a settler could earn a living by clearing a small patch and raising stock, confining the stock to his 160-acre tract. In 1870, 160 acres of the bottom land along the wagon road could be purchased for \$2,000.00 to \$2,500.00; a settler could make a living on 160 acres of the hill land. Messrs. Bennett, Wilson and Hamilton settled on mountain lands within the area of the road grant and made their homes there.

Murray, W. R.—In 1886 settled on a tract of the wagon road land; was of the opinion that 75 per cent of the land grant could be used for pasture land and farmed after clearing. There is not a great deal of grant land in Coos County that would not make pasture land if cleared, and a portion of it is good pasture land in its present condition; cleared and cultivated land selling for \$100.00 and \$200.00 an acre.

Hutson, J. M.—Lived on wagon road land from 1871 to 1879; left because company would not sell to him; the land he settled on was splendid for agricultural purposes; the hill land could be used for pasture after the removal of the timber.

Harlocker, Earl—Came to Coos Bay country in 1871; statistical correspondent for the Agricultural Department 30 years; reported on the character of the land, soils and crops; in 1913, he, with two others,

classified the lands in Coos County into tillable and non-tillable, including in the tillable such as could be cultivated after the timber was removed; estimated that 90 per cent of the wagon road land is tillable, and so reported to the Government.

Many other witnesses testify to the same effect (B. F. 63 *et seq.*).

Against this is the testimony of the following witnesses:

Cotton, J. A.—Said he did not know the boundaries of the grant; never saw the grant; asked what proportion of certain land described to him would be bottom land, he said, "Pretty hard question to answer. I could not say what it was, possibly one-twentieth."

Gurney, S. A.—One-tenth of the area outside of Looking Glass and Flournoy valleys could be cultivated; the other nine-tenths is assessed as grazing land.

Coats, W. H.—Said that only one-tenth of the land is cultivable, and that, he "would not consider the nine-tenths worth much of anything."

This, too, in face of the fact that A. M. Simpson paid \$19,000 for one section.

Bushnell, A. E.—His testimony covers a distance of 14 miles, from Weston to Brewster Valley; the timber on that land, he said, was not worth much; yet, he has lived on 160 acres for 12 or 15 years and raised a family.

Johnson, A. W.—Not well acquainted with Township 28, Range 7 West; the land he is familiar with is in the mountains and is rough; resides on 563 acres, 403 of which he bought in 1889 at \$5.00 an acre.

Rose, I. E.—The land is hilly, covered with timber, small brush, bottom land. The land he got was straight up and down; he burned it off and made a pasture of it, and it has growed up again.

Stemler, J. P.—Never went over the land to examine it; all he knows about it is derived from traveling over the road; could not see very much of the land from the road; resides on 370 acres, for which he asks \$11,000.

Bettis, William—Never made an examination of the wagon road land for the purpose of determining its character; a small portion of the land is bottom land; good portion timber and hill land; his father paid \$2.50 an acre to the Wagon Road Company for 160 acres in 1874.

Lawhorn, L. A.—The hill lands are generally heavily timbered; second growth timber with underbrush; in addition to the hill and bottom land there is bench land, some of which is tillable and good for grazing, but not for staple crops.

We submit the foregoing testimony is indefinite, and not sufficient to overcome the testimony of the witnesses called by the plaintiff.

If it be urged that those who applied to purchase desired only the bottom lands, and that if the company



sold to them at \$2.50 per acre, all the rest would be unsalable, we answer: even then the Wagon Road Company would have made money. The defendant's witness Gurney says that one-tenth of the area outside of Looking Glass and Flournoy valleys could be cultivated. Assuming this to be true, the valleys would make about another tenth, thus two-tenths or 20,000 acres, in round numbers, would be cultivable. Let us, to be safe, put it at 15,000 acres. All defendant's witnesses speak of the bottom land only as cultivable. This land would have sold rapidly at \$2.50 per acre—it was worth nearer \$10.00. At \$2.50 an acre the 15,000 acres would have brought \$37,500, \$4,000 more than the wagon road cost (*infra* 75), add this to the \$37,200 obtained from the sale of the road (B. F. 15), and the \$17,000 for the 6,963 acres disposed of before 1875 (*supra*, 36), and we have the following:

Sale of 15,000 at \$2.50 per acre.....	\$37,500
Sale of wagon road.....	37,200
Sale of 6,963 acres before 1875...about,	17,000
	<hr/>
	\$91,700
Cost of wagon road.....about,	33,000
	<hr/>
Credit balance.....	\$58,700

With this balance the company would have left about 70,000 acres of timber land, which it could well afford to hold for a favorable market. Assuming, we repeat, that those who sought to purchase desired only bottom land, the company's refusal to sell is devoid of justification, even on its own theory.

(f) **The Intention of Congress.**

If ever there was a granting act passed by Congress with full knowledge of the character of the land affected, it is the act we are considering.

The bill was introduced in the Senate by Mr. Williams of Oregon. Many amendments were offered and debated in the Senate (Third Session, Fortieth Congress, Globe, pp. 249-250).

Mr. Williams said:

I have a map here, and can exhibit the condition of the country and the situation of the points referred to if the Senator desires to look at it; but I will state to the Senator that Roseburg is the county seat of Douglas County, and the chief town of the Umpqua Valley. It is surrounded on all sides by mountains. This bill proposes to assist in the construction of a road from Roseburg to the navigable water of Coos Bay through the Coast Range of mountains, so that there may be access to the ocean from Roseburg through the mountains. It is a very difficult and expensive road to construct, and it is very necessary to the people there that they should have this way of egress and ingress. The distance is a little more than fifty or sixty miles.

There are *some small valleys* in these mountains in *which* the land *may* be *worth something*, and it is possible that there may be some timber on the mountains that may be used by the State in the construction of this road with advantage. \* \* \* (Italics mine).

Mr. Hendricks said:

\* \* \* The road will be a costly one to build, and

the *lands* for a very *considerable* distance in the mountains will *not be* of *value*. \* \* \* It (the road) will be mainly through a region of country that is not now inhabited, and that it will be *difficult* to *settle* perhaps, but it will connect a desirable part of the country with the coast.

The bill passed.

In the House of Representatives Mr. Julian moved this amendment:

Provided, that the grant of lands hereby made shall be upon the condition that the lands shall be sold to *actual settlers* only in quantities not greater than one quarter section and for a price not exceeding \$2.50 per acre (*Italics mine*).

Mr. Mallory, Congressman from Oregon, remarked:

I am sure that if the House understood this bill there would be no objection to it. Those who are acquainted with the geography of the State of Oregon know that along the line of the coast there is a high range of mountains known as the Coast range. Between that range of mountains and the Cascade mountains there is a succession of valleys. \* \* \* *A large portion of the land proposed to be granted is not worth anything.* Most of it lies on this range of mountains and *could not be sold for one cent an acre.* Some of it may be valuable in the construction of this road. \* \* \*

In the valley of the Umpqua there is a considerable settlement, and at the Coos river, on the coast, there is another settlement; but along the line extending about sixty miles it is an *unbroken wilderness*. \* \* \*

The grant is made to the State of Oregon, and it is to be controlled by the Legislature. *I have no*

*objection* to the amendment offered by the gentleman from Indiana (*Italics mine*).

Mr. Julian, with the consent of the House, modified his amendment by adding after the words " a quarter section" the words "to each person," and the amendment as modified was passed (B. F. 86).

The bill was returned to the Senate; but the House amendment as laid before it, did not contain the words "actual settlers." How they came to be dropped is not disclosed by the record, but Mr. Julian's amendment, with the exception of these two words, was adopted and the bill became a law.

The fact, if fact it be, that the land is chiefly, or only, valuable for the timber on it, and unfit for cultivation, furnishes no reason for believing that Congress did not mean to limit the quantity that might be sold to one person to 160 acres. The Timber and Stone Act of June 3, 1878, does so, and, in addition, provides, that the lands shall not be sold for less than \$2.50 per acre (20 Stat. 89). In many instances it has been sold for more, the price depending upon the character of the timber. It is a matter of common knowledge that millions of acres have been sold under that act. Why then should the land not be sold under this one?

Congress, however, with full knowledge of the nature of the land, imposed the restrictive proviso. It represents the behest of the law making power, and must be obeyed.



**(g) The Law With Respect to Impossible Conditions.**

The State of Oregon, the Wagon Road Company, and every grantee of that company were, of course, thoroughly familiar with the character of the land at the time they received title thereto. They well knew whether the conditions imposed by Congress could be performed. There was no law compelling them to accept the land with those conditions. If they felt that they could not comply with them, good faith and common honesty alike demanded that they reject the grant, unless they could induce Congress to amend it by eliminating the obnoxious provision. Instead of doing this, they accepted it and agreed to satisfy the conditions imposed. In these circumstances the law refuses to listen to their contention at this time, that the restrictive proviso is impossible of performance.

In *Ingle v. Jones*, 2 Wall 1, the defendant in error made a contract to construct a building, "and make it fit for use and occupancy." He built it as provided in the agreement, but owing to a latent defect in the soil on which the foundation rested, the building cracked, and part of it threatened to fall. This made it necessary to take the building down and rebuild the structure, which was done at a large expense. The contractor, defendant in error, contended that, having fulfilled his contract, he was not responsible for defects arising from a cause of which he was ignorant, and which he had no agency in producing, and, therefore, was entitled to recover the balance due upon the contract. The court in denying his claim said:

This covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its

performance. *Against the hardship of the case he might have guarded by a provision in the contract.* Not having done so, it is not in the power of this court to relieve him. He did not make that part of the building "fit for use and occupation." It could not be occupied with safety to the lives of the inmates. It is a well settled rule of law, that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, *unless its performance is rendered impossible by the act of God, the law, or other party.* *Unforeseen difficulties, however great,* will not excuse him. (Citing authorities. Italics mine.)

#### (h) Other Pertinent Observations by the Supreme Court.

In *United States v. Bags of Coffee*, 8 Cranch, 398, the Supreme Court, answering arguments similar to those urged here by defendant, in a suit brought to enforce a forfeiture provided for by an act of Congress, said:

In the eternal struggle that exists between the avarice, enterprise and combination of individuals, on the one hand, and the power charged with the administration of the laws, on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the Legislature.

### IX.

THE DEFENDANT DECLARES THAT ALL QUESTIONS HEREIN INVOLVED ARE RES JUDICATA, BECAUSE OF THE DECISIONS IN CERTAIN CASES PLEAD IN THE ANSWER.

**(a) Theory of Earlier Suits Inconsistent With the Theory of This Suit.**

According to the answer there were two suits commenced on February 29, 1896, one on August 25, 1897, and one on February 18, 1896. These suits are numbered respectively 2284, 2283, 2406 and 2278. The record in each case is in evidence.

Case No. 2283 proceeded upon the claim that the lands described therein "lie entirely without the limits of the grant in said State of Oregon" and that, hence, the patent for them should not have been issued.

Case No. 2284 involved 30,044 acres of land and was based upon the theory that the lands were outside of the grant limits and had, therefore, been erroneously patented to the Wagon Road Company.

Case No. 2406 charges that the lands covered by it were "outside of the indemnity limits of the grant, and are, therefore, not subject to it," also, that the lands had been homesteaded by Samuel Braden long before the grants attached.

Suit No. 2278 covered 40 acres of land, which it claimed had been homesteaded and was therefore outside of the grant.

From the foregoing recital it is clear that all the suits were based upon the idea that the lands covered by them were not subject to the grant, and were, therefore, erroneously patented.

In the suit at bar, the contention is, that all the lands involved are *covered* by the grant, but that the restrictive proviso of the grant has been breached.

In the earlier cases it was urged that if title passed it did so erroneously, while in this case, the one we are trying, it is claimed by the government that title lawfully passed from the government, but that subsequent to its passage the restrictive covenant which was attached to the grant was breached. The theory, therefore, of those cases is entirely different from that of the instant case.

**(b) Questions Decided in Earlier Cases Different.**

Case No. 2284, as we have seen, was brought to cancel patents to 30,044 acres of land.

A demurrer to the bill was sustained and the action dismissed. There is nothing in the record of the case to show upon what ground the court rested its decision.

An official communication from the District Attorney, May 21, 1897, to the Attorney General, states that:

The demurrer has been argued and the court has sustained the sale, holding that the United States were in no wise interested in this matter; that the real party at interest was the Oregon & California Railroad Company, the prior claimant, and that the suit should be brought in the name of the Oregon & California Railroad Company; that if the Government were to recover in the present litigation it would gain nothing thereby, and lands patented to the Coos Bay Wagon Road Company by the terms of the grant to the Oregon & California



Railroad Company immediately go to said latter company in case the Government was successful in this litigation (B. F. 74).

This letter is admissible on the authority of *Evanston v. Gunn*, 99 U. S., 660.

Suit No. 2283 covered the same land as suit 2406. Speaking of this, Judge Bellinger said in suit 2406:

It goes without saying, that there is no such thing as a demurrer to a general replication; such a replication is a mere formal matter and has the effect to put the case at issue, and there can be, thereafter, no judgment without the trial of the question of fact so presented. The general replication was in proper form, the form adopted in *Story's Equity Pleadings*, if it had been otherwise, and liable to objection, nevertheless, there could be no decree dismissing the bill on that account. I am of the opinion that the demurrer attempted to be pleaded is a nullity, but if it is not a nullity, it is clearly not a decree upon the merits, and is, for that reason, nor a bar to this suit (B. F. 75).

He was right, and the former decision may be treated as negligible.

Suit 2406 was decided in favor of the Government. The lands involved had been disposed of by the Wagon Road Company to the defendant. It was decided that the lands had been erroneously patented. The defendant was not a party to that suit, besides the decision touches no issue in this action.

Suit 2278 decided that the lands involved had not been homesteaded as alleged in the bill, and were, therefore, properly patented.

The question presented and decided in each case was entirely different from anything in litigation here.

**(c) Different Cause of Action Here.**

The evidence necessary to establish the cause of action presented here, would be utterly immaterial as to the causes of action in the prior suits. This is manifest. In the prior cases, the testimony related to the question as to whether or not the lands forming the subject of the action were within or without the limits of the grant. That was the only matter of fact litigated. Testimony bearing upon it would be immaterial in the present case, for no such question is involved here.

In *Chapman v. Smith, et al.*, 16 How., 133, it is said :

One criterion for trying whether the matters or cause of action be the same as in the former suit, is, that the same evidence shall sustain both actions.

In the *Haytian Rep.* 154, U. S. 118, it was decided that:

One of the tests laid down for the purpose of determining whether or not the causes of action should have been joined in one suit, is whether evidence necessary to prove one cause of action would establish the other.

*Cromwell v. County of Sac.*, 94 U. S. 351, is a leading case. The first action was on 23 coupons. It was held that they were invalid because issued fraudulently; that plaintiff purchased before maturity, but did not show, though he alleged, that he had paid value. A demurrer to the bill was sustained and the case

dismissed; the judgment was affirmed by the Supreme Court. Then the plaintiff sues on the bonds to which the coupons belonged, and offered to prove payment of value. The offer was refused on the ground that the question was involved in the prior suit and, hence, was *rem judicatam*. The case was taken to the Supreme Court and reversed.

Judge Field, speaking for the court, said:

It is not believed that there are any cases going to the extent that, because in a prior action a different question from that actually determined might have arisen and been litigated; therefore, such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On *principle*, a point not in litigation in one action cannot be received as conclusively settled in a subsequent action upon a different cause, because it might have been determined in the first action (*Italics mine*).

In the case of *Nesbitt v. Riverside Independent*, District 144, U. S. 610, it was held that:

When the second suit is on the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was *or might* have been presented and determined in the first action, but when the second suit is upon a different cause of action, although between the same parties, the judgment in the former action operates as an estoppel only, as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined (*Italics ours*).

In each case the right of the plaintiff to recover on the bonds was in issue, but the facts upon which the right rested in the one case were different from those upon which it rested in the other, and, hence, judgment in the former was not a bar to the latter. Apply that rule here. In the earlier suits the Government sought, as it seeks in this suit, to recover the title to the lands, but in those suits its claim was based on an entirely different state of facts from the one upon which its claim rests in this case, therefore, following the rule of the Nesbitt case, the judgments in the former suits are not a bar to recover in this suit.

Other cases supporting the same reasoning are: *Mobile v. Kimball*, 102 U. S. 691; *Roberts v. N. R. R. Co.*, 158 U. S. 26; *Russell v. Place*, 94 U. S. 606; *N. P. Ry. Co. v. Slaght*, 205 U. S. 122-131; *Memphis City Bank v. Tennessee*, 161 U. S. 186; *McComb v. Frink*, 149 U. S. 629-641; *Stark v. Starr*, 94 U. S. 477).

But however all this may be, the paramount ground which differentiates those cases from the one at bar is that this is an action to enforce a law (*Oregon & California case*, p. 920) which was not involved in anywise in those cases. Those actions did not rest on the same law. No action for the breach of this law has ever been brought before. The law on which the former actions were bottomed was wholly different. The causes of action are, therefore, not the same. The point involved here was not presented there.

On principle, a point in litigation in one action cannot be received as conclusively settled in a subsequent action upon a different cause because it might have been determined in the first action (*Cromwell case*, 94 U. S., *supra*).



**X.****DEFENDANT IS NOT A BONA FIDE PURCHASER  
FOR VALUE.****(a) Burden of Proof on Defendant.**

The defendant alleges that it is a *bona fide* purchaser. To be such, it must prove that it purchased without knowledge of the granting act, in good faith, and paid a valuable consideration; or that someone of its predecessors, claiming under the grant, was such a purchaser.

In *United States v. Oregon & California Land Company*, 148 U. S. 42, it is said:

The essential elements which constitute a *bona fide* purchaser are, therefore, three: a valuable consideration, the absence of notice, and presence of good faith.

On page 44, speaking of certain facts, the court said, "but at the same time they are significant with respect to that element of good faith, which consists in *diligence*" (Italics mine).

In *United States v. Brannan*, 217 Fed. 849, recently decided, we read:

To be entitled to protection as a *bona fide* purchaser, he must have bought in good faith and paid value \* \* \* the burden is upon him to make satisfactory proof of purchase and payment. The recital in the deed to him did not constitute such proof (Citing many cases; see also *United States v. Des Moines*, 142 U. S. 510-530).

The Brannan case was cited with approval by this court in *Tobey et al v. Kilbourne et al*, 222 Fed. 760-4, and by the Circuit Court of Appeals for the Eighth Circuit in *Stonebraker etc. v. United States*, 220 Fed. 99-101.

This rule is not changed by the allegation in the complaint, that each and all of the parties mentioned in the bill, including the defendant, knew all the transactions complained of. The allegation is not necessary to the complainant's case; it is mere surplusage, and in no way affects the obligation of the defendant to bear the burden of proving that it is an innocent purchaser (*Washington & Georgetown R. Co. v. Hickey*, 166 U. S. 521; *Preswood v. McGowan*, 148 Ala. 475; *Greenleaf on Evidence*, 15th ed., Sec. 51; 16 Cyc. 405; *United States v. Lewis I. Brannan*, *supra*).

Has the defendant sustained this burden? No, as we shall show at once.

#### **(b) Knowledge of the Wagon Road Company.**

The grant from the state to the Wagon Road Company; the company's supplemental articles of incorporation (B. F. 27); President Rose's letter (B. F. 26); the promises of its president, Dr. Hamilton, to sell to settlers at prices not to exceed \$2.50 per acre (B. F. 46 *et seq.*); the resolution of the board of directors, January 12, 1874, appointing A. R. Flint "selecting agent for the company;" and the patents from the Government, each of which recited that it was issued in pursuance of the Congressional granting act, show, without question, that the Wagon Road Company

had full knowledge of the grant and its terms, and, therefore, knew that it was violating them when it made the deeds, two to Miller, one to Besse, and others to divers persons. That its officers were conscious of wrongdoing, is disclosed by the circumstances that the Wagon Road Company carefully kept from the Government all knowledge of its contract with Miller and deeds in pursuance thereof, and continued to ask for and receive patents as if it had not deeded or contracted away the land (B. F. 5, 14).

**(c) Knowledge of the Purchasers Intermediate the Wagon Road Company and Defendant.**

*(1) Notice of the Granting Act.*

Every purchaser is charged with notice of the granting act, because it is a law (*supra*, point 1) and, like every other law, is conclusively presumed to be known to all persons.

*(2) The Recitals of the Patents.*

Each patent, as we have shown (B. F. 35) recites that it was issued in pursuance of the Congressional and Legislative granting acts. The patent is the usual foundation of title to land. This is generally understood. No man of the slightest prudence would deal with a title without consulting the patent, either personally or through another, especially if but a few transfers had been made since the title left the Government. And it is but fair to assume in this case, in view of the size of the transactions, that each purchaser did consult the patents and was aware of their recitals. In

any event, the law charges them with the knowledge they would have obtained if they had searched, and they will not be heard to say that they do not possess it. Diligence is an essential of the defense of **bona fide** purchaser (148 U. S. p. 44).

In *Simmons Creek Coal Company v. Doran*, 142 U. S. 417, 438, it was said:

Whatever is sufficient to put a person on inquiry is considered as conveying notice, for the law imputes a personal knowledge of a fact, of which the exercise of common prudence might have apprised him.

(3) *Recorded Instruments—What They Show.*

The lands bought by the intermediate purchasers embraced a great number of acres, and cost a large sum of money. It is not believable, as we have just observed, that the purchasers invested without a careful study of the title as it was disclosed by the public records. Every document in connection with the title from the Government down, was, no doubt, carefully scrutinized by each grantee. Assuming this to be true, what did the recorded instruments, other than the patents, reveal? The two deeds, one to Miller and one to Besse, from the Wagon Road Company recited that the lands conveyed were part of the lands granted by the act of March 3, 1869, to the state, and by the state to the Wagon Road Company on October 22, 1870; and each deed thereafter, through which the Oregon Southern Improvement Company claimed title, referred back, either directly or indirectly, to the wagon road deeds. Thus bringing to the notice of each grantee the



fact that he was receiving a title which came through the granting acts. In view of this, he was bound to familiarize himself with the terms of those acts.

Through the trust deed, the foreclosure proceeding based thereon, deeds from the Master in Chancery to Rotch and Crapo, and by them to the Southern Oregon Company, the latter acquired the title possessed by the Oregon Southern Improvement Company, charged with all the obligations under which that company had held it.

In *Williamson et al., v. Berry*, 49 U. S. 495, 547, it is said:

In any sale under a decree or order in chancery, the purchaser, before he pays his money, must not only satisfy himself that the title to the property to be sold is good, but he must take care that the sale has been made according to the decree or order.

#### **(d) The Defendant's Knowledge.**

##### *(1) Implied From the Records.*

The defendant is, of course, charged with all the knowledge, both actual and constructive, applicable to its predecessors in title.

In *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417-437, it is said:

Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. *Caveat emptor* is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must

take care, and make due inquiries, or he may not be a *bona fide* purchaser. He is bound not only by *actual*, but also by *constructive* notice, which is the same in its effect as actual notice. He must look to title papers under which he buys, and is charged with notice of all the facts appearing upon their face, *or to the knowledge of which anything there appearing will conduct him*. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a *bona fide* purchaser without notice (Burnell's Adm'rs. v. Fauber, 21 Gratt. 446-463; Washington Sec. Co. v. United States, 234 U. S. 76-79).

Besides defendant has not shown, nor attempted to show, that it did not have all that knowledge, and as we have seen (*supra*, p. ) the burden of proof is on it to show it did not.

## (2) *Defendant Admits Knowledge.*

It is alleged in the answer that defendant had no knowledge 'save what was derived from the records' (B. F. 42). This is quite enough. But the answer goes further and states affirmatively that before purchasing defendant "carefully examined all legislation by Congress and by the State of Oregon affecting the title," and also examined the patents. In addition to this the answer admits that at the same time the defendant had knowledge of the deeds, which the bill charges were given in violation of the restrictive proviso (B. F. 42). A grantee cannot be a good faith purchaser if, at the time of its purchase, it knows every defect in the title purchased. The defense of *bona fide* purchaser must fall.

**XI.****NO EQUITIES IN FAVOR OF DEFENDANT.****(a) Alleged Inequitable Conduct on Part of Government.**

It is said that even if the Wagon Road Company violated the restrictive proviso, and even if the court must find that the defendant purchased with full knowledge of the breaches, and, in consequence must be denied the status of innocent purchaser for value without notice, still, because of certain alleged equities, a strict enforcement of the grant should not be had, but that a decree in favor of the complainant should be conditioned upon the Government returning to defendant all that it has expended on account of the lands.

This contention is made upon the assumption that the defendant believed, when it purchased, that it was acquiring a valid title, *and* that this belief was induced by the conduct of the Government.

Upon what act of the Government could this belief be predicated? Not upon the debate in the Senate, or in the House, at the time the granting act was on its passage; not upon the granting act itself, the act of 1874 authorizing the issuance of patents, nor the issuance of the patents. And these are all. We have heretofore examined them and found that they do not raise an estoppel against the Government; and if they do not constitute an estoppel, which is a defense equitable in its nature, they do not support other equities in favor of the defendant.

The failure of the Government to include the breaches of the condition subsequent in the 1896 and 1897 suits, could not have affected defendant's action when making the purchase, for the obvious reason that it did not occur until nine or ten years afterwards; nor should it have influenced the defendant in making subsequent expenditures. The defendant was charged with the knowledge, for it is the law, that no executive officer of the Government, without specific authority from Congress, could waive the enforcement of a law, and, hence, that the failure of those officers to bring such action was no evidence whatever that the Government did not intend to enforce the restrictive proviso.

But is not this entire contention based upon the theory of laches, or stale claim? The Government is not open to the defense of laches (*U. S. v. O. & C. supra*, 888). This was pointedly decided by the Supreme Court in *United States v. Dalles Mil. R. Co.*, 140 U. S. 599, *supra*. That, too, was an equity case. Judge Deady had applied to the Government the doctrine of laches, and the Supreme Court overruled him.

The defendant, according to its answer, knew at the time it purchased that the grant required the Wagon Road Company to sell in quantities not exceeding 160 acres to one person and at prices not to exceed \$2.50 an acre; that the Wagon Road Company had violated this provision by selling to Miller the 35,533.59 acres and to Besse the 61,143.37 acres. It knew, too, that the Wagon Road Company had broken faith with the Government, dishonestly repudiated its contract, and refused to carry out its agreement, that it would hold the lands upon the "conditions and limitations"



imposed by the grant. Notwithstanding this knowledge, the defendant took the title and paid the purchase price. If "A" purchases property from "C," with full knowledge that it has been stolen from "B," will he be heard to say in a court of equity, when "B" seeks to recover, that before "B" can have a judgment, he must pay him back the money which he paid to "C" for the property? "B" could answer, as the Government answers here, "I did not receive the money which you ask me to pay; you may be entitled to recover it from the man that stole *my* property, but you have no right, either in a court of equity or of law, to exact it from me."

### **"Dishonest" Government**

Appellant complains of the "dishonesty" of the government because, forsooth, it did not act as a guardian for Crapo, an "ex-member of congress" and "leading lawyer;" for Rotch, the "distinguished civil engineer and railroad builder;" for Besse, the "experienced sea captain;" for Elijah Smith, the "Harriman of the west." But was it under any legal or ethical obligation to do so? It had placed its will upon the statute books of the nation, where any one who desired might read. If the gentlemen just mentioned, and who formed the defendant company, refused to read where they might have found the truth, or contemptuously ignored the land laws on the premise that "they are all doing it," the fault was theirs, not the government's.

The long disregard for the law embodied in the restrictive proviso by the appellant is offered by it as a reason why it should not be called to account at this

time for its dereliction. Sometimes the fact that the offender had not previously fallen into sin has been urged in mitigation of the first offense, but not until now had we ever heard of a delinquent pleading the long duration of "his offending" as a reason why the law should not visit upon him the just consequences of his fault. Hard cases make not only bad law but desperate arguments.

### **The Lower Court Gave to the Appellant Much More Than It Was Entitled To**

Strictly speaking, the appellant has no title to the land involved in this suit. It was acquired in violation of law, and of course the law cannot approve a title thus procured. The decision, we respectfully submit, should have been that appellant never obtained any title. This would have left the title in the Coos Bay Wagon Road Company.

There is nothing in the Oregon & California case opposed to this. It is authority for holding that the Coos Bay Wagon Road Company, if existing, would be entitled to the "full value" which the grants conferred up it, namely, \$2.50 an acre, but it is not authority for saying that the appellant has any title to the land. It holds the contrary in deciding that the law—the grants—forbade a transfer of the land except in conformity with the restrictive covenant. The government, however, does not now insist upon this.

#### **(b) Alleged Opinion of Eminent Counsel.**

Not a particle of competent testimony appears in the record to sustain the claim of the answer that the

purchase was made on the opinion of "eminent counsel." If this was so, why was not the opinion produced? No one testifies to having seen or read such an opinion. True, Crapo says that Besse, who was a sea captain, told him that the title had been examined by a professional man in Portland, who declared the title to be valid in the grantor, but he never saw the opinion (B. F. 97). Mr. Rotch says he got the notion that the title was good, because it had been examined by lawyers, but he could not recall who did the examining, or that he had ever read or heard read the opinion of any lawyer upon the subject.

Mr. Charles R. Smith, president of the defendant company, testified that Elijah Smith, former president of that company, had told him that he (Elijah) had the opinion of a Pittsburg attorney concerning the title, but did not produce it. Nor has such an opinion been found (B. F. 100).

This is all in support of the statement that the title was purchased upon the opinion of "eminent counsel." It fails, of course, to sustain the claim. And even if the claim was established, it would avail nothing. The defendant cannot justify its purchase of a defective title, with full knowledge of its infirmities, by showing that it was advised by a lawyer that the title was good. The true owner of the property is not responsible for the unsound opinion; to deprive the Government of its property because of an act which it did not cause, would be the height of inequity.

Judge Brewer, speaking for the court in the United States v. Cal. & Ore. Land Co., 148 U. S. 31, 41, said:

A court of equity can act only on the conscience of a party; if he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction.

**(c) Mr. Mallory's Opinion.**

The firm of Dolph, Mallory, Simon & Gearin, or the part then existing, was the legal adviser of the Oregon Southern Improvement Company from the beginning, and has occupied the same relation to the defendant company from its incorporation down to the present day. Mr. Mallory, a member of Congress when the granting act passed, and, as we have shown *supra*, thoroughly familiar with the purpose of Congress in placing the restrictive proviso in the act, became a member of this firm in 1883. Surely he did not advise the defendant company, or the Oregon Southern Improvement Company, that the restrictive proviso was not applicable. His knowledge was the knowledge of his client (The Distilled Spirits, 11 Wall. 356, 357; Stanley v. Schwalby, 162 U. S. 225).

**(d) Opinion That Title Was Defective.**

Those to whom Mr. Kinney had agreed to sell, found no great difficulty in discovering that the title was not sound (B. F. 84, 86).

**(e) Defendant's Claim That it Believed the Title to be Valid.**

The defendant alleges that it purchased believing that each of its grantors "had the unconditional fee simple title" (Ans. 38). In making out the defense of



innocent purchaser the defendant must show more than a mere belief, no matter how firm, that it was getting a good title. Unless it can prove that it did not have either actual or constructive knowledge of the facts which shows a bad title, it cannot succeed. Defendant seems to be in the situation of a man who admits that he knew the gun was loaded, but did not believe that it would hurt a person if discharged into his body. Having admitted the facts defendant is charged, incontestibly, with knowledge of the consequences attached to them by the law.

But did it actually believe it had an unconditional fee simple title? If so why did it refuse to give warranty deeds? (B. F. 83).

In 1888 Elijah Smith told Mr. Siglin that his company was an innocent purchaser and not, therefore, bound by the terms of the grant (B. F. 38). At that early day he knew the title had flaws, but he hoped to shield himself and his company by the defense of *bona fide* purchaser.

Look, too, at the transactions through which the Oregon Southern Improvement Company acquired title. On December 20, 1883, Crocker conveyed to Besse; nine days afterwards, or on the 29th of December, Besse conveyed the same land to Gray; six days afterwards, or on January 5, Gray conveyed to the Oregon Southern Improvement Company; two days afterwards, or on January 7, the Wagon Road Company conveyed the 61,143.37 acres to Besse; and five months afterwards (or according to the amended answer, three days before) Besse conveyed the same land to the Oregon Southern

Improvement Company, and on January 1, 1884 (still three days before), the Oregon Southern Improvement Company mortgaged the lands then owned by it or thereafter to be acquired, to the Boston Safe Deposit & Trust Company (B. F. 32). Why these transactions within a few days of each other, if not for the purpose of covering something—of preparing the defense of *bona fide* purchaser? There is no other reasonable explanation. It shows a consciousness of wrongdoing.

Consider, too, the transfer from the Oregon Southern Improvement Company to the Southern Oregon Company. According to the testimony of Rotch, assistant treasurer, a man well acquainted with the matter, and now having no direct interest in the suit, the stockholders and bondholders of the Oregon Southern Improvement Company were identical (B. F. 79). The bondholders, then, controlled the company. There was no occasion for foreclosing the trust deed in order that control of the property might be obtained by them, for they had that control already. Yet, it was foreclosed and the property bought in by the Southern Oregon Company, formed and controlled by the same men who controlled the Oregon Southern Improvement Company (B. F. 79 *et seq.*).

Was not this for the same purpose as the many conveyances?

(1) *Another Reason Why Defendant Did Not Believe the Title Good.*

Witnesses called by the complainant and by the defendant alike, testified that the terms of the grant

were a matter of common knowledge in Empire, Marshfield, and among the settlers along the line of the road; that a person could not go amongst the people without ascertaining the terms of the restrictive proviso. Mr. Loggie, one time manager of the company, said: "Mr. Hazzard and myself have talked of the conditions many times, there was nothing secret about it. It was generally known that that was a condition in the grant from the United States Government to the State of Oregon, that it not only said 160 acres to settlers or actual settlers, but not more than \$2.50 an acre" (B. F. 37).

If this was generally talked about and believed in the community, the defendant must have known it. How could the defendant be in darkness when there was light everywhere?

(2) *Theory on Which Defendant Purchased.*

Why, it may be asked, did the defendant take the title notwithstanding its patent infirmities? At the time of this purchase, and for many years before and after, little attention was paid in Oregon, or for that matter in any other part of the west, to the law governing land grants. Men took upon themselves the responsibility of ignoring the laws of the United States, that they might profit thereby. Whether the officers of the defendant acted upon that theory, we do not know, but their conduct would *indicate* that they did.

(f) **Cost of Wagon Road.**

Is there anything else in the situation which creates an equity in favor of the defendant, or of any

of its predecessors in title subsequent to the State of Oregon?

The road was about 65 miles long; some 20 miles of it, extending from Roseburg west, had been constructed in early days and it cost the company very little to conform it to the specification of the new road (B. F. 88). There was, therefore, but 45 miles which required new construction, and considerable of this runs through valleys where practically no grading was necessary. A number of witnesses familiar with the road, some having helped to build it, and all having knowledge of the cost of road construction in that part of Oregon, testified upon the subject. Some give the cost as to one part and some as to another. Only two testified with respect to the whole road, Harry and Murray. The former said he had traveled over the road many times, and had been supervisor of road construction over the mountains for 21 years. He placed the cost at \$500 per mile, while Murray placed it at from \$500 to \$700 a mile. Murray was, however, a mere workman and had no experience in contracting. Harry had much experience, and was thoughtfully qualified to speak upon the subject. Some of the others place the cost of the parts with which they were familiar, at less than \$500 per mile, and some at more. But we believe Harry's testimony to be about right. Assuming this to be true, the road—65 miles—cost \$33,500. The Wagon Road Company sold the road to Miller for \$37,200, and received in addition about \$17,000 for the 6,963 acres sold prior to May 31, 1875. From the total of these two items, deduct the cost of the road, \$33,500, and there will be \$20,700 left. If we add to this, the \$35,534 received from Miller, and the \$91,715.05 received from



Besse (B. F. 13), we have a total of \$147,949.05, which the Wagon Road Company reaped from the transaction. The profit realized by the Wagon Road Company was considerable, and shows conclusively that there is no equity on this score in favor of that company, and that none could have devolved upon the defendant from that source.

**(g) Alleged Advantages of the Road to the Public.**

It is alleged that the distance which the property, the troops, and the mails of the United States had to be carried, was reduced many hundred miles by the construction of the road (B. F. 88).

This finds no support in the testimony. Loggie, Siglin, Weekly, Harlocker, Stevenson and Mast, testified that they never saw United States troops on the road, although they were familiar with it from the beginning down to the present time. There is no testimony from anybody, that the road was ever used by troops.

The delivery of the mail was not much facilitated during the summer months, and not at all during the winter months. Before the road was completed, the mail was brought over once a week by pack horse, and after completion, was carried in the same way during the winter months, and they were many. Harlocker, Murray, Miller, Krantz, Hall and Norris testified to this effect (B. F. 88).

The road, then, did not bring any particular advantages, in the way of transportation, to the people of the vicinity.

**(h) Toll Collected.**

For a long time the company collected toll, and a very good toll, for the services rendered, so Buell, Harry and Laird testified (B. F. 89).

**(i) Alleged Expenses on Account of the Land.**

Hockett, bookkeeper of the defendant company, presented a table showing receipts \$124,281.92 and expenditures \$815,978.44, making a debit balance of \$691,696.52 (B. F. 90). This is valueless, for he was unable to state how much of the alleged expenses were on account of wagon road lands and how much on account of the Luse lands. He guessed, but that was all (B. F. 90). We know the account is inaccurate because it does not include the \$65,000 received from Kinney (B. F. 92).

Consider the item of \$218,207.83, general expenses. How could that sum of money have been expended on account of a tract of wild land upon which the company had not made directly a dollar's worth of improvements? The interest item of \$218,829.49, shows that a large sum was borrowed on account of this land. Perhaps it is the interest upon the balance of the purchase price, but in any event it shows the land has been used by the company as the basis of a large credit, hence, it has been of great value to the company.

But there is another view of this matter. The smallness of the receipts is due to the unwillingness of the company to sell. It has refused to sell because it believed it would reap a greater reward by holding the

land for higher prices. That the land has increased in value is shown by the testimony.

Cruises of the land in Coos County were made by official cruisers of the county. Their fairness and competency are vouched for by the defendant, for it called them to the witness stand (B. F. 70). The cruise of Douglas County was made by Mr. Guthro, an employe of the defendant, after the suit was instituted (B. F. 70). The result of the cruises in both counties appear in the following table:

#### DOUGLAS COUNTY.

Grazing .....	11,934 acres
Sheep range .....	832 “
Cultivation .....	1,122 “
Part cultivation .....	975 “
Not classified .....	1,760 “
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Total .....	16,623 acres
Cruised not in bill.....	120 acres
In bill not cruised.....	1,760 “
Timber .....	293,416,000 feet

## COOS COUNTY.

Grazing .....	27,860 acres
Part grazing .....	5,780 "
Cultivation .....	14,980 "
Part cultivation .....	12,330 "
Agricultural .....	1,320 "
Part agricultural .....	200 "
No value .....	3,120 "
Little value .....	4,280 "

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Total .....	69,870 acres
In bill not cruised.....	4,660 "

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Total .....	74,530 acres
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Timber .....2,065,665,000 feet

Total cruised in bill (Douglas).....	16,623 acres
Total cruised in bill (Coos).....	69,870 "

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Total .....	86,493 acres
Not cruised in bill.....	6,430 "

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Total .....	92,923 acres
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Total timber .....2,359,081,000 feet



It is said this timber is very valuable. Assuming that it is worth \$1.00 per thousand, it would amount to \$2,359,081. To this must be added the value of the land, which would equal at least \$500,000 more, making a total of \$2,859,081; deduct from this the debit balance of \$691,696.52 and there will be a net balance of \$2,167,384.48.

What caused this increase in value? Not anything done by the company, for the testimony is overwhelming that its conduct has retarded the development of the locality (infra). It is due entirely to the enterprise and labor of the other members of the community. If the company has lost by waiting to realize a value produced by others, and to which it contributed nothing, that loss forms no basis for an appeal to equity.

#### **(j) Injurious Effect of the Policy Pursued.**

Many witnesses testified that the policy of the Wagon Road Company and its successors in title, including the defendant, in refusing to make sales of the lands had a paralyzing effect upon the development of southwestern Oregon. Messrs. Siglin, Weekly, Harlocker, Bettis and Loggie gave testimony to that effect. Mr. Loggie, former general manager, said that the policy of the Oregon Southern Improvement Company and the Southern Oregon Company, in reference to making sales within the terms of the restrictive proviso "retarded the development of the county, as their property covered a large part of the county, and that on general principles adherence to that kind of

policy would retard the growth of any place'' (B. F. 93). Can it be that such a course of conduct entitles the actor to the special consideration of a court of equity?

**(k) Knowledge of Present Owners.**

Mr. Charles R. Smith and his relatives have become the owners of four-fifths of the entire issue of the capital stock of the company. Mr. Smith's first purchase was made in May and his last in October, 1910, more than two years after Congress had authorized the institution of this suit. A long time before his purchase he talked with Mr. Elijah Smith about the title, and learned from him that there was a flaw in it. True, Mr. Elijah Smith said he had the opinion of a Pittsburg lawyer to the effect that the title was good. But he also said that he was going to ask the Attorney General of the United States to bring suit with respect to the title. The opinion of the Pittsburg lawyer, Mr. C. R. Smith never saw (B. F. 86). The slightest inquiry would have revealed to him that in 1902, eight years before, when Kinney attempted to purchase, the title had been rejected because of its defects. Anyhow, Mr. Smith and his relatives—Mr. Smith was acting for them—acquired the present holdings with full knowledge that the title was in question. The Government did nothing to allure them into this. On the contrary, it had some years before, by the joint resolution of April 30, 1908, instructed the Attorney General to bring suit with respect to the lands. No, Mr. Smith and his friends bought into a law suit; they took their chances, and have no just ground for asking equity to relieve them from their legal obligations.

Defendant submits two authorities in support of its argument upon this point. (*Brent v. Washington Bank*, 10 Pet. 596; *U. S. v. Arrendondo* (6 Pet. 691).

In the first case there was a legal bar to the relief which the United States sought, and the court held that the removal of the bar would be conditioned on the government doing equity. No question of the enforcement of a statute was involved.

The second case (*United States v. Arrendondo*) was cited by the defendants in the Oregon and California case without avail. There is nothing in it which supports the defendant. It is an exceptional case. The plaintiff claimed certain lands in Florida, under a grant made to him by the Spanish Government before the United States had acquired title to Florida by the treaty with Spain. The government denied the validity of the plaintiff's title. An act of Congress was passed authorizing the federal courts to determine the controversy. Fourteen pages of the opinion are devoted to a review of the rules laid down by Congress for the decision of the case. It is observed by the court that the performance of the condition subsequent appearing in the grant was *prevented* by the act of Spain, the *grantor*, in ceding the lands to the United States, and therefore, that it would be inequitable to strictly enforce the condition. The conclusion of the court is that "the title of the claimant is valid according to the stipulation of the treaty of 1812, the laws of nations, of the United States, and of Spain (p. 749).

In a part of the opinion it is said that if the grantee could not strictly perform the condition subse-

quent because of the act of the grantor, he might "do it *cy pres* \* \* \* and save himself from the forfeiture" (p. 744). How could the application of that doctrine help defendant? There is no showing that the defendant, or any of its predecessors in title subsequent to the State, has performed the condition *cy pres*, or at all; nor that it has even attempted to do so.

The present attitude of the defendant is that of law defiance. It does not offer to comply with the terms of the grant. If it did there might be more force in its petition to the conscience of a chancellor.

The principle of *cy pres* cannot serve the defendant; what it needs is a rule of decision which will authorize it to totally ignore the law.

### Supreme Court Decision

Again we go to the decision of the Supreme Court in the Oregon & California case, which, in our judgment, disposes of every question in this case. The court speaking of the failure of the defendants in that case to earlier raise certain questions with respect to the applicability of the restrictive provisos in the grants before the court said:

Had there been an assertion of rights against the act of 1869, and had there been an immediate rejection of its provisions and obligations, the question in the present case would not now be submitted for solution. It is possible to suppose that no patents to lands would have been issued, or, at any rate, the government's attention would have been challenged to the assertion of rights which it might have contested from a position of supreme advantage (p. 921).



Very pertinent here. If the defendants, instead of relying upon the assumption that the Government would not enforce one of its own laws, brought an action to test the meaning of the restrictive covenant, which could have easily been arranged, they would have no occasion to find fault at this time with the failure of the government to act more promptly.

The case of *Nichols v. Southern Oregon Co.*, 135 Fed. 232, settled one question respecting this grant, and another suit could have been brought by private parties to settle the questions debated in the instant case.

## XII.

### THE DEFENDANT URGES THAT LIMITATIONS ON THE RIGHT OF SALE CANNOT BE EN- FORCED WHERE THE GRANT IS TO THE STATE.

A number of decisions have been brought to the court's attention by the defendant in support of the above statement (*Seymour v. Saunders*, 3 Dillon 437-443; *Wilcox v. McConnell*, 13 Pet. 496-516; *Camp v. Smith*, 2 Minn. pp. 131, 143, 144; *Dunklin County v. Dist. Co. Court*, 23 Miss. Rep. 449-456; *Mills County v. R. R. Co.*, 107 U. S. 557, 566; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 702; *Emigrant Co. v. County of Adams*, 100 U. S. 61, 69; *Cook Co. v. C. C. Canal, etc.*, 138 U. S. 633, 655, *McNee v. Donahue*, 152 U. S. 587, 602; *U. S. v. Des Moines, etc. Co.*, 142 U. S. 510, 541; *Chandler v. C. & H. Min. Co.*, 36 Fed. 665, 667; *U. S. v. Louisiana*, 127 U. S. 182, 187).

We have read them all. Most of them are devoted to a construction of the swamp land acts, or acts of similar import.

The case of Mills County v. R. R. Co. is characteristic; in that case lands were granted to the State of Iowa, and it was authorized to sell them and apply the proceeds to the reclamation of certain lands, if necessary. The State sold the lands to the railroad company. Mills County commenced action against the railroad company on the ground that the State had not applied the proceeds in accordance with the terms of the act, and, therefore, the railroad company's title had failed. This the court denied. It held, in effect, that the State had sold the lands in strict conformity with the grant; that the railroad company had acquired a good title, and that the failure of the State, if it did fail, to apply the proceeds properly could not affect the Railroad Company's title. That does not illustrate any question in this case. The sales here were not in conformity with the grant, but in disregard of its terms.

Camp v. Smith, *supra*, is the only case out of the number which even squints at the proposition stated by defendant. It says:

The federal government may regulate the terms on which it will give lands to the citizens, fix the prices for which it shall be sold, and give preference to certain purchasers, but when the terms of the gift are complied with, or the purchase money paid, the gift or purchase is complete (p. 143).

That case sustains everything for which we contend, namely, that the "government may regulate the terms on which it will give land to the citizens," and "fix the

prices for which it shall be sold." The power of the government over the lands, until the terms of the government have been complied with, is not denied. If the terms of the government had been complied with here, this suit would never have been instituted.

## CONCLUSION.

The government gave its lands on terms so plain that to even doubt the meaning seems a travesty on common sense. The grantee accepted them on these terms, obeyed enough to secure patents, and then cast the others to the winds. With full knowledge of all this the defendant purchased. It was not necessary that defendant should have invested its money for the purpose of protecting a right or discharging an obligation. Its action was purely voluntary. The failure of the government to bring suit was not ground for such a course. Repeated decisions of the Supreme Court make it clear that laches are not imputable to the government, and that executive officers, unless specially authorized by Congress have no power to waive the enforcement of a law. And, therefore, it was obvious that the failure of such officers to act with respect to the grant under consideration, was no evidence that the government had waived the covenant or acquiesced in its breach. Defendant's action in purchasing under the circumstances was supreme folly. It must have reasoned on the hypothesis that the government would ignore its own laws, and refrain from claiming what belonged to it. No one has a right to proceed on such a belief. But if he does, he must accept the consequences.

Obedience to the will of Congress is essential. Equity has no reward for the defendant who flouts the law.

The decree below was right and should be affirmed.

Respectfully submitted,

CONSTANTINE J. SMYTH,

*Special Assistant to the Attorney General.*



## TABLE OF CASES CITED.

For the convenience of the court, the authorities hereinbefore cited, quoted or discussed have been tabulated, with appropriate reference to the pages of the argument, and the table is hereto appended.

Anderson v. Carey (36 Ohio St., 506-575).....	32
Atty. General's Op. (Vol. 16, pp. 572, 576).....	29
A. & E. Enc. of Law (Vol. 24, p. 146).....	26
Bennecks v. Insurance Co. (105 U. S., 355, 359).....	17
Bennett v. Chapin (7 L. R. A., 377-381).....	32
Bird v. United States (187 U. S., 118, 124).....	2
Brent v. Washington Bank (10 Pet., 596).....	76
Burnell's Admrs. v. Fauber (21 Grat., 446-463).....	59
Burnham v. Burnham (79 Wis., 557).....	32
Butler v. Thompson (92 U. S., 412).....	16
Camp v. Smith (2 Minn., 131, 143, 144).....	86
Case v. Devire (15 N. Y., 265, 266).....	32
Chandler v. C. & H. Min. Co. (36 Fed., 665, 667).....	86
Chapman v Smith (16 How., 133).....	51
Cook County v. C. C. Canal, etc. (138 U. S., 635, 655).....	86
Cope v. Cope (137 U. S., 682).....	12
Cromwell v. Sac. County (94 U. S., 351).....	51-53
Cyc (Vol. 16, p. 405).....	61
De Peyster v. Michael (6 N. Y., 467-492-493).....	32
Distilled Spirits, The, (11 Wall. 356, 367).....	65
Dunklin County v. Dist. Co. Court (23 Miss., 449-456).....	86
Emigrant Co. v. County of Adams (100 U. S., 61).....	86
Evanston v. Gunn (99 U. S., 660).....	54
Greenleaf on Evidence (15th ed. sec. 51).....	55
Hagar v. Reclamation District (111 U. S., 701, 712).....	86
Hamilton v. Rathbone (175 U. S., 414).....	3
Hawkins v. United States (96 U. S., 689).....	23
Haytian Republic (154 U. S., 118).....	51
Ingle v. Jones (2 Wall., 1).....	46
Kohlsaat v. Murphy (96 U. S., 153, 160).....	4
Lessieur v. Price (53 U. S., 59).....	32
Latimer v. Waddell (26 S. E., 122).....	32
Madlebaum v. McDonnell (29 Mich., 77-97).....	32
Memphis City Bank v. Tennessee (161 U. S., 186).....	53
Merryman v. Bourne (9 Wall., 592).....	56
Mills County v. R. R. Co. (107 U. S., 557, 566).....	78
Missouri, K. & T. R. R. Co. v. United States (235 U. S., 37).....	83
Missouri, etc. R. R. Co. v. Kansas Pacific (97 U. S., 491, 497).....	2
Mobile v. Kimball (102 U. S., 691).....	53

Mobile & Ohio R. R. Co. v. Tennessee (153 U. S., 486, 502)....	4
McComb v. Frink (U. S., 629-641).....	53
McCluskey v. Cromwell (11 N. Y., 601).....	4
McNee v. Donahue (142 U. S., 587, 602).....	85
New York Indians v. United States (170 U. S., 1).....	23
Nesbitt v. Riverside Ind. Dist. (144 U. S., 610).....	52
Nicholas & Southern Oregon Co. (135 Fed. 232).....	78
Northern Pac. R. R. Co. v. Slaght (205 U. S., 122-131).....	53
Oates v. National Bank (100 U. S., 239, 244).....	3
Oregon & California v. United States (35 S. C. R., 908) . . 2, 5, 22, 28,	77
Platt v. Union Pacific (99 U. S., 48, 64).....	4
Potter v. Couch (141 U. S., 315).....	32
Preswood v. McGowan (148 Ala., 475).....	55
Rannels v. Rowe (145 Fed., 296).....	23
Rice v. Railroad Company (66 U. S., 358).....	4
Roberts v. N. P. R. R. Co. (158 U. S., 26).....	53
Russell v. Place (94 U. S., 606).....	53
Rutherford v. Greene (15 U. S., 196).....	32
Schulenberg v. Harriman (88 U. S., 44).....	23
Scovil v. McMahan (21 L. R. A., 58).....	32
Seymour v. Saunders (3 Dillon, 437-443).....	78
Simmons Creek Coal Co. v. Doran (142 U. S., 417, 438).....	57, 58
Smith v. Townsend (148 U. S., 490, 494).....	4
Stark v. Starr (94 U. S., 477).....	53
St. Paul v. Northern Pacific (139 U. S., 1).....	4
Stanley v. Schwalby (162 U. S., 255).....	65
Sutherland, Lewis, Statutory Construction (Vol. 2, pp. 698-702) ..	4
The Distilled Spirits (11 Wall., 356, 367).....	71
Tiger v. Western Investment Co. (221 U. S., 286).....	12
Tobey v. Kilbourne (222 Fed., 760).....	55
United States v. Arrendondo (6 Pet., 691).....	76
United States v. Bags of Coffee (8 Cranch, 398).....	49, 83
United States v. Brannan (217 Fed., 849).....	54, 55
United States v. Budd (43 Fed., 630).....	28
United States v. C. & O. Land Co. (148 U. S., 31).....	54, 64
United States v. C. & O. Land Co. (192 U. S., 355).....	51
United States v. Clark (138 Fed., 294).....	28
United States v. Des Moines (142 U. S., 510-541).....	78
United States v. Louisiana (127 U. S., 182, 187).....	86
United States v. N. C. & St. L. R. Co. (118 U. S., 120).....	28
United States v. N. P. R. R. Co. (95 Fed., 864-880).....	28
United States v. O. & C. R. R. Co., et al (186 Fed., 861, 892).....	
..... 3, 4, 5, 6, 17, 22, 26, 29, 31, 34,	68
United States v. Insley (130 U. S., 263).....	28
United States v. W. V. etc. R. Co. (54 Fed., 807, 812).....	27, 28
United States v. Dalles M. W. R. Co. (140 U. S., 549).....	28, 61

United States v. Union Pacific (91 U. S., 72, 79).....	5
Van Brocklin v. State of Tennessee (117 U. S., 151).....	28
Vandershie v. Hanks (3 Calif., 28-41).....	32
Washington & Georgetown R. Co. v. Hickey (166 U. S., 521).....	55
Washington Sec. Co. v. United States (234 U. S., 76-79).....	59
Watson v. Jones (13 Wall., 679).....	56
Wilcox v. McConnell (13 Pet., 496-516).....	78
Wilkinson v. Leland (27 U. S., 627, 662).....	4
Williamson, et al., v. Berry (49 U. S., 495, 544).....	58
Winona v. Barney (113 U. S., 618, 625).....	3
Wisconsin R. R. Co. v. Price (133 U. S., 496, 510).....	29

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IN THE  
United States Circuit Court of Appeals  
NINTH CIRCUIT.

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SOUTHERN OREGON COMPANY,  
*Defendant and Appellant.*

v.

UNITED STATES OF AMERICA,  
*Complainant and Appellee.*

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BRIEF OF THE FACTS FOR THE UNITED STATES.

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CONSTANTINE J. SMYTH,  
*Special Assistant to the Attorney General.*

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HOGAN LINOTYPING CO., OMAHA

Filed

MAY 3 - 1918

F. D. Monckton,  
Clerk,





## TABLE OF CONTENTS.

ABSTRACT OF PLEADINGS.....	2
Bill .....	2
Answer .....	14
THE TESTIMONY.....	25
I. PASSAGE OF THE CONGRESSIONAL AND LEGISLA- TIVE GRANTING ACTS ADMITTED.....	25
II. THE WAGON ROAD COMPANY WAS SUBSTITUTED FOR THE STATE.....	26
Assent of Wagon Road Company.....	26
III. THE CONSTRUCTION AND ACCEPTANCE OF THE ROAD .....	28
IV. SALES PRIOR TO THE ISSUANCE OF PATENTS.....	28
V. PASSAGE OF ACT OF 1874, AUTHORIZING THE ISSU- ANCE OF PATENTS.....	29
VI. THE ISSUANCE OF PATENTS.....	31
VII. THE ORGANIZATION OF THE OREGON SOUTHERN IMPROVEMENT COMPANY AND SOUTHERN OREGON COMPANY .....	31
VIII. HOW DEFENDANT COMPANY ACQUIRED TITLE FROM WAGON ROAD COMPANY.....	32
IX. SMALL SALES TO INDIVIDUALS.....	33
X. BREACHES OF THE RESTRICTIVE PROVISIO BY THE WAGON ROAD COMPANY.....	34
XI. BREACHES BY THE OREGON SOUTHERN IMPROVE- MENT COMPANY.....	34
XII. DEFENDANT COMPANY NOT IN ACTUAL POSSESSION OF THE LAND.....	35
XIII. NOTICE GIVEN BY THE PATENTS AND THE DEEDS IN THE CLAIM OF TITLE.....	35
(a) The Patents.....	35
(b) The Deeds.....	36

XIV.	THE DEFENDANT HAD ACTUAL KNOWLEDGE OF THE TERMS OF THE GRANT AND OF THE BREACHES..	37
	Terms of the Grant Understood by the Community.....	37
XV.	THE LAND COULD HAVE BEEN SOLD IN 160 ACRE TRACTS .....	46
XVI.	THE CHARACTER OF THE LAND.....	63
XVII.	THE CONTENTION OF THE DEFENDANT THAT THE RESTRICTIVE PROVISIO IS NOT APPLICABLE, BE- CAUSE OF THE CHARACTER OF THE LAND, IS NOT SUPPORTED BY THE TESTIMONY.....	71
XVIII.	THE DEFENSE OF RES JUDICATA IS UNTENABLE...	74
XIX.	DEFENDANT IS NOT A BONA FIDE PURCHASER....	76
	Other Testimony Bearing on this Point.....	77
	Refusal to Give Warranty Deeds.....	83
XX.	WAIVER, LACHES AND ESTOPPEL, NOT APPLICABLE.	83
XXI.	ALLEGED EQUITIES OF DEFENDANT.....	83
	No Competent Proof that Attorneys Passed the Title as Good .....	84
	Mr. Mallory's Relation to the Matter.....	87
	Cost of Road.....	88
	Road of Little Advantage to Public.....	88
	Tolls Were Collected by Wagon Road.....	89
	Purported Expenses on Account of the Lands.....	89
	Value of the Lands.....	92
	Policy of Defendant and its Predecessors in Title in Refus- ing to Sell has been Injurious to the Community in which the Land is Located.....	93

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**BRIEF OF THE FACTS FOR THE UNITED STATES.**

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This is an appeal from a decree in favor of the United States in an action brought by it to have forfeited the title to 96,000 acres of land, on the ground that the grant of the land from the government contained conditions subsequent which had been breached, and for general equitable relief. The court held that the grant was not upon conditions subsequent, but that it contained certain enforceable covenants which had been violated by the appellant and certain of its predecessors in title, and hence entered the decree complained of.



**ABSTRACT OF PLEADINGS.****The Bill Sets Forth (R. p. 2):**

1. The names of the parties and that the defendant is an Oregon corporation.

2. The granting Act, which reads :

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road: *Provided*, That the lands hereby granted shall be exclusively applied to the construction of said road and to no other purpose, and shall be disposed of only as the work progresses; *Provided further*, That the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section, and for a price not exceeding two dollars and fifty cents per acre; *And provided further*, That any and all lands heretofore reserved to the United States, or otherwise appropriated by act of Congress or other competent authority, be, and the same are hereby, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way to the width of one hundred feet is granted: *And provided further*, That the grant made shall not embrace any mineral lands of the United States, or any lands to which homestead or preemption rights have attached.

Sec. 2. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of by the legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the Government of the United States free from tolls or other charges upon the transportation of any property, troops, or mails of the United States.

Sec. 3. *And be it further enacted*, That said road shall be constructed with such width, graduation, and bridge as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

Sec. 4. *And be it further enacted*, That the State of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands, not previously reserved to the United States, nor otherwise disposed of, and not exceeding six miles in distance from it, equal to the amount reserved from the operation of this act in the first section of the same, to be selected in alternate odd sections, as provided in section first of this act.

Sec. 5. *And be it further enacted*, That lands hereby granted to said State shall be disposed of only in the following manner, that is to say, when the governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed thirty sections, may be sold, and so on from time to time, until said road shall be completed; and if said road is not completed within five years no further sale shall be made, and the lands remaining unsold shall revert to the United States: *Provided, however*, That the entire amount of public land granted by this act shall not exceed three sections per mile for each mile actually constructed.

Sec. 6. *And be it further enacted*, That the United States surveyor general for the district of Oregon shall cause said lands, so granted, to be surveyed at the earliest practical period after said State shall have enacted the necessary legislation to carry this act into effect.

3. That through inadvertence the aforesaid Act of Congress contained no provision authorizing the issuance of patents, and, to correct this omission, Congress did, on June 18, 1874, pass the following act:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases when the roads in aid of the construction of which lands were granted are shown by the certificate of the governor of the State of Oregon, as in said act provided, to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon, as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: *Provided*, that this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled.

4. That on October 22, 1870, the State of Oregon passed an act entitled "An Act donating certain lands to the Coos Bay Wagon Road Company," which, after reciting *verbatim* the aforementioned congressional act of 1869, reads:

*Be it enacted by the Legislative Assembly of the State of Oregon.*

Section 1. That there is hereby granted to the Coos Bay Wagon Road Company all lands, right-of-way, privileges, and immunities heretofore granted or pledged to this State by the Act of Congress, in this act heretofore recited for the purpose of aiding said company in constructing the road mentioned and described, in said Act of Congress, upon the conditions and limitations therein prescribed.

Sec. 2. There is also hereby granted and pledged to said company all moneys, lands, rights, privileges and immunities which may be hereafter granted to this State to aid in the construction of said road for the purposes, and upon the conditions and limitations mentioned in said Act of Congress, or which may be mentioned in any further grants of money or lands to aid in constructing such road.

Section 3. Inasmuch as there is no law upon this subject at the present time this act shall be in force from and after its passage.

5. That the granted lands are situate in the counties of Coos and Douglas.

6. That the Wagon Road Company represented to the officers of the United States that it had constructed the road contemplated by the acts of Congress and was entitled to the granted lands, and applied to the Interior Department for patents, which were issued to the company as follows:

Patent No. 1, dated February 12, 1875, embracing 42,496.93 acres;



Patent No. 2, dated March 18, 1876, embracing 1,080.00 acres;

Patent No. 3, dated November 8, 1876, embracing 61,111.53 acres;

Patent No. 4, dated February 17, 1877, embracing 431.65 acres.

7. That prior to May 31, 1875, the Wagon Road Company sold and conveyed about 6,963 acres of the granted lands to, approximately, 53 purchasers, as is shown by exhibit "A" attached to the bill.

8. That in evasion of the restrictive proviso of the granting act the Wagon Road Company, on May 31, 1875, entered into a contract with one John Miller to convey to him 96,676.96 acres of the granted lands, and on the same day delivered to Miller a conveyance for 35,534 acres for the sum of \$35,534, and also a deed of the wagon road for the sum of \$37,200.

9. That the said Miller, in the transactions aforesaid, was acting for the benefit of Collis P. Huntington, Charles Crocker, Leland Stanford and Mary Hopkins, and that on June 22, 1875, he conveyed by deed the said 35,534 acres to Collis P. Huntington, Charles Crocker, Leland Stanford and Mary Hopkins.

10. That by the contract between the Wagon Road Company and Miller, it was provided that the directors of the company should continue to act for the use and benefit of Miller, and that this was done for the purpose of enabling Miller, and those for whom he was acting, to conceal from the government the violations of the

granting act resulting from the conveyances to him; that the patents were applied for in the name of the Wagon Road Company, and that its corporate existence was maintained for the purpose of concealing from the government the fact that the land had been transferred in violation of the grant.

11. That on March 27, 1882, Huntington, Stanford and Hopkins conveyed to the said Charles Crocker and their interests under the deed from Miller to them; that on December 20, 1883, Crocker conveyed the same land to Wm. H. Besse, who on December 29, following, conveyed the same to Russell Gray, who on January 5, 1884, conveyed the same to the Oregon Southern Improvement Company, an Oregon corporation.

12. That on January 7, 1884, in violation of the grant the Wagon Road Company conveyed to Wm. H. Besse the 61,143.37 acres, being the balance of the grant, and that on June 4, following, Besse, conveyed the same lands to the Oregon Southern Improvement Company; thus giving to that company 96,677.37 acres, the amount for which this action is prosecuted.

13. That on January 1, 1884, in further violation of the grant the Oregon Southern Improvement Company gave to the Boston Safe Deposit and Trust Company a trust deed, covering all the property then owned by it or thereafter to be acquired, to secure the payment of the bonds of the first named company. This covered all of the granted lands, *as well as other property.*

14. That on November 9, 1886, the Boston Safe

Deposit and Trust Company was succeeded by Wm. J. Rotch and Edward D. Mandell as trustees under the deed of trust.

15. That on December 28, 1886, these trustees, instituted a suit in the Circuit Court of the United States for Oregon to foreclose the trust deeds; that on April 11, 1887, a decree was entered directing the defendant Oregon Southern Improvement Company to pay the trustees the sum of \$1,516,666.66; that in default of the payment, the property was sold in pursuance of the decree, by George H. Durham, as Master, to Wm. J. Rotch and Wm. W. Crapo for the purported price of \$120,000; that on November 16, following, Durham, as Master, conveyed the property to the purchasers, Rotch and Crapo; that on December 14, following, Rotch and Crapo conveyed the land to the *Southern Oregon Company*, an Oregon corporation.

16. That Rotch, Mandell and Crapo acted as agents in all the transactions aforementioned for the benefit of the Oregon Southern Improvement Company, its officers and stockholders, who were *identical* with the stockholders and owners of the Southern Oregon Company, and that, in fact, the latter company was but a reorganization of the first company.

17. That the aforesaid deed of trust was executed for the benefit of the stockholders of the Oregon Southern Improvement Company; that the indebtedness which it pretended to secure, was fictitious, and represented simply the interest of the stockholders; that the deed of trust was executed and foreclosed with the intent of evading and defeating the rights of the government

under the grant and in the hope that the conditional estate created by the grant might be converted into an unconditional one, for the use and benefit of the stockholders and owners of the Oregon Southern Improvement Company.

18. That none of the bonds, purported to be secured by said deed of trust, were held by others than stockholders of the Oregon Southern Improvement Company, and that the price alleged to have been paid for the property, except such as was necessary for court expenses, was paid by the stockholders of the Oregon Southern Improvement Company, and constituted a mere nominal transaction for the purpose of defeating the rights of the government.

19. That in addition to the sales of the granted lands, already mentioned, there were other sales after May 31, 1875, when the Miller deed was made, and that these sales are described in exhibit "G" attached to the bill; that the Southern Oregon Company claims to be the owner of the lands sued for, a description of which is given in exhibit "H" attached to the bill; that no one claims any interest in the lands but the complainant and defendant; that said lands are wild and unoccupied and are of a value exceeding \$4,000,000, and that the defendant, in violation of the terms of the grant, asserts and assumes to exercise and enjoy an unconditional estate in all said lands, free from each and all of the terms and provisions of the grant.

20. That the Coos Bay Wagon Road Company and Southern Oregon Improvement Company have been dissolved.



21. That the parties to each transaction mentioned in the bill, except the complainant, had notice of the transactions of what had theretofore transpired with respect to the title.

22. That all the lands sued for are situated in a *most* remote portion of the State of Oregon, and are difficult of access; and that the Coos Bay Wagon Road Company, and those claiming under it, have from time to time sold small quantities of the land ostensibly in pursuance of the terms of the grant.

23. That so far as the complainant knows neither the Wagon Road Company, nor any of the parties succeeding to it, appeared to be, or were known to the complainant to be, asserting any estate in the lands in violation of the terms of the grant, but on the contrary each of them was ostensibly claiming no rights in the lands, except as subject to the provisions and conditions of the grant.

24. That by reason of the premises, the violations set out in the bill were wholly unknown to the complainant until 1907; that thereupon the violations were brought to the attention of Congress and, as a result, a joint resolution was passed and approved April 30, 1908, in pursuance of which this action was instituted

25. The resolution reads:

That the Attorney-General of the United States be, and he hereby is, authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any and all rights and remedies of the United States of

America in any manner arising or growing out of or pertaining to either or any of the following described Acts of Congress, to-wit: \* \* \* ; also "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Rosebury in said State," approved March third, eighteen hundred and sixty-nine; \* \* \* ; including all rights and remedies in any manner relating to the lands, or any part thereof, granted by either or any of said Acts; and in and by any and all such suits, actions, or proceedings the Attorney-General shall, in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States relating to subject of such suits, actions and proceedings, including the claim on behalf of the United States that the lands granted by each of said Acts respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said Acts which may be alleged and established in any such suits, actions, or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being intended to fully authorize the Attorney-General in and by such suits, actions or proceeds to assert on behalf of the United States and the court or courts before which such suits, actions, or proceedings may be instituted or pending to entertain, consider and adjudicate the claim and rights of the United States to such forfeiture, or forfeitures, and if found to enforce the same: *Resolved further*, That the authority and direction hereinbefore given shall extend to any and all suits, actions or proceedings which may be instituted or pending under the authority of the Attorney-General at the time of the adopting and approval hereof.

26. That by reason of the aforesaid breaches all of the lands mentioned in exhibit "H" are forfeited to the complainant, free from all right of the defendant; and that pursuant to the authority contained in the joint resolution, the complainant assumes the title and ownership of said lands.

27. That the defendant company has repeatedly threatened, and still threatens, and will, unless restrained, sell and convey, or in some manner encumber or impair the title to said lands, and will, unless restrained, commit waste upon said lands, particularly as to the timber, thereby causing irreparable injury to the complainant.

### **The Bill Prays:**

1. That the defendant be required to make discovery as to all matters aforesaid and to answer, but not under oath, the matters and things charged in the bill.

1. That a decree be entered:

(a) Forfeiting all the lands described in exhibit "H," attached to the bill, and reinvesting the title thereto in the complainant.

(b) Quieting the title thereto in the complainant.

(c) Enjoining the defendant from asserting any right or interest in the lands, or from in any manner selling, or offering them for sale, and from conveying or in any manner disposing of them; from negotiating or recording any document, or from doing any other thing affecting the use or title to the lands; from going upon the lands and cutting or removing, or in any manner

using the timber, trees or other natural products thereof; from committing waste upon the lands, or in any manner using or interfering with them.

(d) And from doing any of the acts aforesaid pending the litigation.

3. That the complainant may have such other and further relief as the equities in the case may require, including costs.

4. That process may issue.

There are eight exhibits attached to the bill:

“A” contains a description of the lands sold before May 31, 1875 (R. p. 36).

“B” is a copy of the contract between the Wagon Road Company and Miller (R. p. 42).

“C” is a copy of the deed from the Wagon Road Company to Miller, showing a consideration of \$35,534 (R. p. 55).

“D” is a copy of the deed for the wagon road from the Wagon Road Company to Miller, showing a consideration of \$37,200 (R. p. 72).

“E” is a copy of the deed from the Wagon Road Company to Besse of the 61,143.37 acres for the stated consideration of \$91,715.05 (R. p. 78).

“F” is a copy of the deed of trust from the Oregon Southern Improvement Company to Boston Safe Deposit and Trust Company (R. p. 101).

“G” describes the lands sold in small quantities subsequent to May 31, 1875 (R. p. 127).



“H” describes the lands involved in this suit (R. p. 131).

**The Answer (R. p. 143):**

1. Admits the corporate character of the defendant, the passage of the Act of 1869, the Act of 1874, and the Legislative Act of 1870; that the Wagon Road Company was a corporation, as alleged in the bill, and that the grant lands are situated in the counties of Coos and Douglas.

2. Denies that the defendant enjoys the benefits of the acts of Congress pleaded in the bill, except as stated in the answer, and denies that the patents were issued in pursuance of the Act of March 3, 1869, but alleges that they emerged under the authority of the Act of 1874.

3. Admits the sale of 6,963 acres of land before May 31, 1875.

4. Admits the contract between the Wagon Road Company and Miller for 96,676.96 acres; but alleges that the sale was made in good faith and for a valuable consideration; that the Wagon Road Company then had an unconditional fee simple title to the lands evidenced by patent No. 1.

5. Admits the two deeds of May 31, 1875, from the Wagon Road Company to Miller, one for 35,534 acres of land and the other for the wagon road; alleges they were made in good faith and for a valuable consideration, but denies that they were in violation of the terms of the grant.

6. Alleges that defendant is without knowledge as to whether Miller was acting only as agent, as stated in the bill, for Huntington, Crocker, Stanford and Hopkins, but denies that the contract or deeds aforesaid were made for the purpose of concealing the truth.

7. Admits the conveyance of the land and wagon road by Miller to Huntington and others on June 22, 1875.

8. Denies that the corporate existence of the Wagon Road Company was maintained for the purposes alleged in the bill and admits the issuance of patents Nos. 2, 3 and 4 to the Wagon Road Company, but denies that they were issued by the United States in ignorance of the facts stated in the bill; alleges that by the passage of the Act of June 18, 1874, Congress ratified the Act of the State of Oregon of June 22, 1870, by which the lands were transferred to the Wagon Road Company.

9. Alleges that on May 31, 1875, the wagon road had been fully completed and its completion certified to the Secretary of the Interior by the governor of the State of Oregon; that the whole of the lands granted to the company, 105,120.11 acres, had been fully earned: that it was entitled to patents therefor; that its corporate existence was maintained for the purpose of receiving these patents and not for the purpose of deception.

10. Admits the transfers from Huntington and others to Crocker, from Crocker to Besse, from Besse to Gray and from Gray to the Oregon Southern

Improvement Company; also the transfers from the Wagon Road Company to Besse and from Besse to the Oregon Southern Improvement Company; but denies that the deed from the Wagon Road Company was made in violation of the grant, for, as alleged, prior to its execution of the deed Congress had, by the Act of June 18, 1874, waived the conditions of the restrictive proviso, and authorized the issuance of patents, free and clear of all conditions; and denies that Besse was the agent of the Oregon Southern Improvement Company.

12. Admits that the Oregon Southern Improvement Company delivered to the Boston Safe Deposit and Trust Company the deed of trust mentioned in the bill, but denies that it was in violation of the granting act.

13. Alleges that defendant believes the allegations of the bill, with respect to the foreclosure of the trust deed, the purchase of the property at the foreclosure sale, and the deeding of it to the Southern Oregon Company, to be true.

14. States that defendant neither admits nor denies the allegations of the bill, to the effect that Rotch, Mandell and Crapo acted in all the transactions set out in the bill as agents of the Oregon Southern Improvement Company; that the Southern Oregon Company was organized by the stockholders of the first named company, and that the stockholders of the one were identical with the stockholders of the other.

Denies that the trust deed was executed for the benefit of the stockholders of the Oregon Southern

Improvement Company; that the indebtedness which it secures was fictitious; that the foreclosure was for the purpose of evading the restrictive provisions of the grant; that none of the bonds secured by the trust deed were owned by others than the stockholders of the Oregon Southern Improvement Company; that the price purported to have been paid at the foreclosure sale was not paid in fact, and that the foreclosure and sale therein involved no actual change of ownership. But alleges that the sale was in good faith; that the title to the property actually passed, and that the plaintiff knew, or could, by proper inquiry, have known all the facts with respect to the matter.

15. Admits that since May 31, 1875, some of the granted lands were sold in small quantities and that exhibit "G," attached to the bill, contains an accurate schedule thereof.

16. Admits that the company claims to be the owner of the lands in question, but denies that they are worth over four millions of dollars, and alleges that they are worth not more than a million dollars.

17. Admits that the Wagon Road Company and the Oregon Southern Improvement Company have been dissolved.

18. Denies that the defendant, at the time it purchased, knew any of the transactions that had theretofore transpired, as set forth in the bill, *other* than "as disclosed by the records and legislation with reference to the said lands;" and denies that those through whom



it claims title, subsequent to the government, had the knowledge charged to them in the bill.

19. Admits that it claims an unconditional estate in the lands described in exhibit "H," attached to the bill, being the lands sued for, free from all the conditions of the grant.

20. Admits that the lands sued for are in a remote portion of the State of Oregon; that the Wagon Road Company and its successors have, from time to time, sold small quantities thereof, but denies that the Wagon Road Company, or any of said parties claim the lands in violation of the act of Congress; that any of them were claiming no rights in said lands, except as the beneficiaries of the act of Congress; and that any alleged violation of the grant were concealed from the plaintiff, or were wholly unknown to the plaintiff until 1907.

21. Admits the passage of the joint resolution authorizing the bringing of the suit.

22. Denies that the lands sued for have been forfeited to the United States.

23. Denies that the defendant has repeatedly threatened to sell or convey the lands sued for, and denies that the defendant will commit waste if not restrained.

24. Alleges that the wagon road was completed before March 3, 1874, and that as sections were completed the lands were sold, as the company could find

purchasers, in quantities of 160 acres, more or less, to one person before May 31, 1875; alleges that more than 43 years have elapsed since the date of the grant, and that during all that time the Wagon Road Company and all persons claiming under it, including the defendant, have been in open and notorious possession of the land, claiming it by adverse possession, and that the government has acquiesced in the claim.

25. Alleges that the suit is barred by Section 391 of Lord's Oregon Laws, Section 8 of the Act of Congress approved March 3, 1891, and Section 1 of the Act of Congress approved March 2, 1896.

26. Alleges that the action is also barred by laches, acquiescence and ratification, and by estoppel arising therefrom, as shown by the following acts: the passage by Congress of the Act of 1874, with the knowledge, as alleged, of the transfer of the land from the State of Oregon to the Wagon Road Company; open and notorious possession, such as the nature of the lands would admit, by the Wagon Road Company, the defendant and the intermediate holders of the title; the use of the wagon road by the United States under the terms of the grant; and acquiescence for upwards of 40 years in the various transfers shown by the records.

27. Alleges that Congress, being wholly without knowledge of the character of the lands, adopted the restrictive proviso, and thereby attached to the act a condition, which wholly defeated the object for which the act was passed, and said proviso, being, as alleged, repugnant to the grant, is wholly void.

28. Alleges:

(a) That defendant is a *bona fide* purchaser in good faith and for full value;

(b) That before purchasing it carefully examined all legislation by Congress and the State of Oregon affecting the title to the lands, made special inquiry concerning the same, carefully examined the patents, and was advised by eminent counsel that the title was clear and unincumbered.

(c) That the deeds of conveyance made before May 31, 1875, were recorded, and carried notice to all, including the plaintiff, that the Wagon Road Company was selling lands to a single purchaser in greater quantities than 160 acres.

29. That through inquiry the defendant also ascertained, before purchasing:

(a) The terms of the granting Act of 1869; the terms of the legislative Act of October 22, 1870; the acceptance by the Coos Bay Wagon Road Company of the transfer of the lands; that the completion of the road had been duly certified to the governor of the State as provided by the Act of 1869; that the Wagon Road Company had sold all the lands for which purchasers could be found willing to purchase in tracts of 160 acres.

(b) The existence of the contract between Miller and the Wagon Road Company, and the conveyance of the 35,533.93 acres to Miller; also that all deeds to the lands were duly recorded in the counties in which the lands severally lie, to-wit, the counties of Douglas and Coos.

(c) That in accordance with the Act of June 18, 1874, the United States caused patents to be delivered to the Wagon Road Company as follows:

Patent No. 1, dated February 12, 1875, for 42,496.93 acres.

Patent No. 2, dated March 13, 1876, for 1,080 acres.

Patent No. 3, dated November 8, 1876, for 61,111.53 acres.

Patent No. 4, dated February 17, 1877, for 431.65 acres.

(d) That under the contract with Miller he was to pay a dollar an acre, or \$35,534, for the land deeded to him; that he conveyed the deeded lands, and the wagon road, to Huntington and others on May 31, 1875, and that these deeds were duly recorded.

(e) That the Wagon Road Company upon receiving patents Nos. 2, 3 and 4 notified Huntington and his associates, they having in the meantime received an assignment from Miller of his contract, that it was prepared to convey to them the balance of the land, to-wit, 61,111.93 acres; that Huntington and his associates refused to accept a conveyance; that the Wagon Road Company commenced suit in the Circuit Court of the State of Oregon for Coos County, praying for an order that the lands *conveyed* by Miller to Crocker be subjected to a vendor's lien in favor of the Wagon Road Company for the balance of the purchase money under the contract; that the case was transferred to the Circuit Court of the United States for the District of



Oregon and that a decree was entered allowing the prayer of the complaint.

(f) That Charles Crocker, by a deed from Huntington and others, dated March 27, 1882, became the owner of the property conveyed by Miller to Huntington and his associates; that Crocker conveyed these lands to Besse, Besse to Gray and Gray to the Oregon Southern Improvement Company, as alleged in the bill.

(g) That the Wagon Road Company conveyed to Besse the lands, 61,111.93 acres, covered by patents Nos. 2, 3 and 4, who later conveyed the same lands to the Oregon Southern Improvement Company on January 4, 1884.

(h) That on January 1, 1884, the Oregon Southern Improvement Company made a trust deed to the Boston Safe Deposit and Trust Company of all the granted lands, and a further trust deed of the same lands to the same company in 1885.

(i) That on December 9, 1886, the Boston Safe Deposit and Trust Company was succeeded by Wm. Rotch and Edward D. Mandell as trustees; that the trust deed was foreclosed and the property sold in default of the amount then due, viz., \$1,516,666.66; that it was purchased by Wm. J. Rotch and Wm. W. Crapo, to whom a deed therefor was subsequently made.

(j) That on December 14, 1887, Rotch and Crapo conveyed to the defendant company, in good faith, and for full value; and that the defendant purchased same in good faith for full value and without notice that the

title was conditional; that all the deeds just referred to were duly recorded, and that the plaintiff had actual and constructive notice of every transaction theretofore set out.

30. Alleges again that each purchaser acquired the title in the open market and in good faith for full value, believing the same to be without defects and that the transactions mentioned extended through a period of 38 years.

31. Alleges that the holders of the title have paid up to the year 1909 taxes in the sum of \$172,443.49, and that the taxes for the years 1909 to 1912 amounting to \$99,752.62 have not been paid, but that defendant has deposited a certified check with the Clerk of Coos County, Oregon, to provide for their payment.

32. Alleges that at the time the granting act was passed the United States mails were carried between the navigable waters of Coos Bay and Roseburg with great difficulty and at large expense; that property and troops of the United States could not be transferred between those points without loss of time and large cost; that to avoid this condition Congress passed the Act of March 3, 1869; that the wagon road was completed in due time, at large expense, and formed an excellent highway between the points mentioned; that by its completion, the distance which the property, troops and mails of the United States had to be carried between said points, was greatly reduced; that the government availed itself of the use of the wagon road immediately after its completion for the transportation of property, troops and the mails, and has continued to

do so for a term of more than 39 years, without tolls or other charges, much to its financial advantage; that the price for carrying the mails alone has been reduced many thousands of dollars.

33. Alleges that the grant was on *in praesenti* to the State of Oregon, a sovereign State, and that the restrictive proviso does not constitute a condition subsequent, but mere a non-enforceable direction or request as to the future distribution of the lands, and was waived and abandoned by the Act of June 18, 1874, and by the issuance of patents thereafter.

34. Alleges that on February 27, 1896; February 29, 1896; August 25, 1897, and February 18, 1896, the plaintiff commenced certain suits in the Circuit Court of the United States, for the District of Oregon, against certain parties, including the defendant, to recover certain of the lands described in the suit, and that the decision in each of those suits constitute a bar to this suit.

35. Alleges that at the time said suits were commenced the complainant was fully informed of all the facts set out in the complaint in this case, and alleged in neither of said suits that the grant to the State of Oregon was a condition subsequent, or that there had been a forfeiture or breach of the condition.

36. Alleges that by the institution of said suits and the acquiescence by the complainant in the decrees therein, the United States waived any and all rights which it may have had to assert forfeiture of the lands described in the bill, and is estopped from asserting title thereto.

37. Alleges that this court, as a court of equity, is without jurisdiction to determine the case.

38. Alleges that the patents mentioned were issued to the Wagon Road Company in accordance with the Act of June 18, 1874, and not otherwise; that said act ratified the action of the State of Oregon in granting the lands to one person, without reference to the limitation of 160 acres, and, by reason of this fact, plaintiff is estopped to say the subsequent transfers were in violation of the act.

39. Alleges again that by the compact between the State and the United States the latter has no constitutional right to interfere with the control of the lands in question and, therefore, the suit should be dismissed.

## **THE TESTIMONY.**

### **I.**

#### **Passage of the Congressional and Legislative Acts Admitted.**

The passage and approval of the Congressional Granting Act of March 3, 1869, and the Act of the State Legislature, by which the grant was transferred to the Wagon Road Company, are admitted (Ans., R. p. 143).

### **II.**

#### **Wagon Road Company Was Substituted for the State.**

The Coos Bay Wagon Road Company filed its articles of incorporation with the Secretary of the State



of Oregon on April 15, 1868. The purpose of the corporation was to construct and maintain a wagon road from Coos Bay to Douglas County, Oregon, and its capital stock was \$40,000 (R. p. 402).

Supplemental articles, filed January 31, 1870, provided that the contemplated wagon road should extend from Coos Bay to Roseburg (Id.).

The Legislature of Oregon on October 22, 1870, passed an act granting to the Coos Bay Wagon Road Company all the lands granted to the State by the Act of March 3, 1869. This act recites the passage of the granting Act of March 3, 1869, and provides in Section 1:

That there is hereby granted to the Coos Bay Wagon Road Company all lands, rights-of-way, privileges, and immunities heretofore granted or pledged to this State by the Act of Congress, in this act heretofore recited for the purpose of aiding said company in constructing the road mentioned and described, in said Act of Congress, upon the *conditions and limitations therein prescribed* (Ans., R. p. 143). (Italics mine.)

#### ASSENT OF WAGON ROAD.

On March 11, 1870, Mr. Aaron Rose, as president of the Wagon Road Company, sent to the Commissioner of the General Land Office a letter which, in part, reads as follows:

Herewith I have the honor to transmit to you a copy of an "Act of the Legislative Assembly of the State of Oregon entitled 'An Act donating certain lands to Coos Bay Wagon Road Company,'" also transmit to you a map showing the

survey and definite location of the road. If any more papers are necessary please notify me (R. p. 403).

On April 11, 1872, the Wagon Road Company again amended its articles by inserting the following:

This corporation hereby assents to and accepts the grant of lands, right-of-way and all of the conditions and provisions of the Act of Congress approved March 3, 1869, entitled "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg in said State." And also of the act of the legislative assembly of the State of Oregon, approved October 22, 1870, entitled An Act donating certain lands to the Coos Bay Wagon Road Company. And also assents to and accepts all further acts of said Congress or of the Legislative Assembly of the State of Oregon granting lands or other property or thing in aid of the construction of said road. \* \* \*

Also to organize, establish and maintain a system of immigration from other states and territories of the United States and from Europe to the State of Oregon. \* \* \* (R. p. 403).

The first list selecting lands was prepared by the company on March 22, 1873, and contains the following:

The Coos Bay Wagon Road Company under and by virtue of the Act of Congress entitled "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg in said state, dated 3d of March, 1869," and the Act of the Legislative Assembly of the State of Oregon aproved 22d day of October, 1870, conveying said

“grant” to the Coos Bay Wagon Road Company \* \* \* hereby make and file the following list of selections of public lands claimed by said company as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of said Act of Congress (R. p. 404).

The oath attached to this list reads as follows:

I, A. R. Flint, being duly sworn, deposes and say that I am the land agent of the Coos Bay Wagon Road Company; that the foregoing list of lands which I hereby select is a correct list of a portion of the public lands claimed by the said company as enuring to the State of Oregon to aid in the construction of the wagon road \* \* \* for which a grant of land was made by the Act of Congress approved on the 3d of March, 1869. \* \* \* (Id.).

### III.

#### **The Construction and Acceptance of the Wagon Road.**

In due time the governor of Oregon certified that the road was completed in conformity with the Act of Congress (Deft. Ex. 190, R. p. 537).

### IV.

#### **Sales Prior to the Issuance of Patents.**

The Wagon Road Company prior to the issuance of any patents sold and conveyed to 53 individuals approximately 6,963 acres (R. p. 405). The aggregate consideration stated in the deeds is about \$17,500, but this fact does not appear in the record.

## V.

**Passage of the Act of 1874, Authorizing the Issuance of Patents.**

It created no new rights except the right to have the patents issued.

It is claimed that by the passage of the Act of June 18, 1874, and the issuance of patents in pursuance of it, the government waived and abandoned the restrictive proviso (Ans., R. p. 154).

The act is entitled "An Act to authorize the issuance of patents to the State of Oregon in certain cases" (*Supra*, p. 4).

When the bill was under debate in the Senate, the following occurred:

Mr. Edmunds: There ought to be a provision in that this act shall not revive any land grant which has already expired, and providing that this bill shall create no new rights of any kind.

Senator Kelly from Oregon answered: I have no objection to such an amendment; but the bill only applies to roads already completed.

Thereupon Mr. Edmund offered his amendment, which reads:

Provided, that this act shall not be construed to revive any land grants already expired, or to create any new rights of any kind.

Commenting upon the amendment, Senator Sargent said:



a steamboat costing about \$100,000, and other property (R. p. 405).

The Southern Oregon Company, also an Oregon corporation, was organized by the bondholders and stockholders of the Oregon Southern Improvement Company, on March 25, 1886, for the purpose of purchasing the property of the latter company at a judicial sale made in pursuance of the foreclosure of the trust deed given by the Oregon Southern Improvement Company to secure its bonds. It was merely a reorganization of the last named company. For many years it operated canning works and a large saw mill upon the Luce lands, and controlled the chief industries of Empire City on Coos Bay (R. p. 405).

### VIII.

#### **How Defendant Acquired Title from Wagon Road Company.**

The Wagon Road Company on May 31, 1875, conveyed to John Miller 35,534 acres; Miller conveyed to Huntington, Crocker, Hopkins and Stanford, June 22, 1875; Huntington and the other associates of Crocker conveyed to Crocker by deed of March 27, 1882; Crocker conveyed to Wm. H. Besse by deed of December 20, 1883; Besse conveyed to Russell Gray by deed of December 29, 1883, and Gray conveyed to the Oregon Southern Improvement Company by deed of January 5, 1884 (R. p. 406).

The Wagon Road Company on January 7, 1884, conveyed to Wm. H. Besse 61,143.37 acres, the balance

of the grant; and Besse conveyed to the Oregon Southern Improvement Company by deed of June 4, 1884 (Id.).

The Oregon Southern Improvement Company executed and delivered to the Boston Safe Deposit and Trust Company, on January 1, 1884, a trust deed upon all the property, real and personal, then owned or thereafter to be acquired by it, to secure the payment of the bonds issued by the grantor company (Id.).

On November 9, 1886, the Boston Safe Deposit and Trust Company, as trustee, was succeeded by William J. Rotch and Edward D. Mandell, as trustees. These trustees on December 28, 1886, instituted a suit in the Circuit Court of the United States for Oregon, to foreclose the trust deed; on April 11, 1887, a decree was entered directing the defendant Oregon Southern Improvement Company to pay the sum of \$1,516,666.66 and that in default of the payment the property should be sold; payment was not made and the property was sold by George H. Durham as master to William J. Rotch and William Crapo for the reported price of \$120,000; on November 16, following, Durham as master conveyed the property to the purchasers Rotch and Crapo; and on December, following, Rotch and Crapo conveyed it to the Southern Oregon Company (R. p. 406).

## IX.

### Small Sales to Individuals.

Subsequent to May 31, 1875, 4,470 acres of the lands were sold to individuals, eight sales by the Wagon Road

Company, six by Crocker, two by the Oregon Southern Improvement Company and fourteen by the Southern Oregon Company (R. pp. 27, 158).

## X.

### **Breaches of the Restrictive Proviso by the Wagon Road Company.**

The bill charges that the contract between the Wagon Road Company and Miller for the sale of the 96,667.30 acres, the conveyance of the Wagon Road Company of the 35,534 acres to Miller and the conveyance by the Wagon Road Company to Besse of the 61,143.37 acres, constitute breaches of the restrictive proviso (Bill, R. pp. 10, 11, 19).

The answer admits the transfers, but denies that they were violations (Ans., R. pp. 145, 154).

## XI.

### **Breaches by the Oregon Southern Improvement Company.**

The bill charges that the deed of trust by the Oregon Southern Improvement Company to the Boston Safe Deposit and Trust Company was a breach (Bill, R. p. 20).

The answer admits the giving of the deed but denies that it was a breach (Ans., R. p. 155).

**XII.****Defendant Company Not in Actual Possession of the Land.**

The bill charges that the lands involved are wild, unoccupied and unimproved and that none of them have ever been, or are now, in the possession of the defendant.

The answer, paragraph XIX, admits these statements to be true, but in paragraph XXVI alleges that the defendant is in possession, open and notorious.

The testimony of Armstrong, vice president and manager, Hockett, bookkeeper of defendant company, shows that all the lands were unoccupied and unimproved, except about 693 acres, which were under lease or had been more or less improved by former tenants.

**XIII.****Notice Given by the Patents and the Deeds in the Chain of Title.****(a) The Patents:**

Each patent contains the following:

*Whereas* by the act of Congress approved March 3, 1869, entitled "An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg in said State," authority is given to the Coos Bay Military Wagon Road Company to construct a military wagon road in accordance with the said act \* \* \*;

*And whereas*, the State Legislature of Oregon,



by the act of October 22, 1870, designated the said Coos Bay Military Wagon Road Company, the beneficiary of said grant;

*And whereas*, the said Wagon Road Company has applied for a conveyance of the title to the lands granted by the said Act of March 3, 1869, in conformity with the act approved June 18, 1874.

\* \* \*

### **(b) The Deeds:**

The deed from the Coos Bay Wagon Road Company to John Miller, conveying 35,534 acres specifically refers to the act of March 3, 1869, and sets forth its title; the deed from Miller to Huntington, et al, specifically refers to the last mentioned deed; the deeds from Huntington, et al, to Crocker, specifically refer to the deeds from the Wagon Road Company to Miller, and from Miller to Huntington, et al; the deed from Crocker to Beese, specifically refers to the deed from the Wagon Road Company to Miller; the deed from Besse to Russell Gray specifically refers to the deed from the Coos Bay Wagon Road Company to Miller; the deed from Gray to the Oregon Southern Improvement Company specifically refers to the deed from the Wagon Road Company to Miller; the deed from the Coos Bay Wagon Road Company to Beese, conveying 61,143.37 acres, specifically refers to the granting act of March 3, 1869, and the granting act of the Oregon legislature of October 22, 1870; the deed of Besse to the Oregon Southern Improvement Company specifically refers to the Congressional granting act of March 3, 1869, and the State granting act of October 22, 1870. All of these instruments were duly recorded (R. p. 407).

**XIV.****The Defendant Had Actual Knowledge of the Terms of the Grant and of the Breaches.**

In its answer defendant alleges:

That before purchasing defendant carefully examined all legislation by Congress and by the State of Oregon affecting the title to said lands and made special inquiry concerning same. \* \* \* That before making said purchase the defendant carefully examined the patents for said lands. \* \* \* (R. p. 168).

**TERMS OF THE GRANT WERE UNDERSTOOD BY THE  
COMMUNITY.**

George W. Loggie, manager of the Oregon Southern Improvement Company and the Southern Oregon Company from 1885 until 1892 (R. p. 381), testified that he knew the grant contained the restrictive proviso and this was generally known in the Coos Bay country; that he had heard the matter discussed by business men, as well as those interested in the land; that the restrictive proviso was discussed at various times in his office and he had discussed the matter with Hazzard & Wilson (attorneys for the company) (R. p. 381 et. seq.).

Frank Batter, an employee of the Oregon Southern Improvement Company and Southern Oregon Company, whose duties required him to visit the settlers on the grant lands, testified that all of the settlers knew that the lands had been granted, and the impression was that the settlers were going to get the grant lands for \$2.50 an acre, and if they did not the government

would get back the land. Batter, under date of July 26, 1891, reported to the company the contention of a settler on a tract of the grant lands, that the company was required to sell according to the terms of the restrictive proviso (R. p. 386).

George K. Quine, sheriff of Douglas County; 52 years old; has resided in Douglas County all of his life, testified that he had talked to the settlers on the grant lands and it was generally understood among the people that the lands was to be sold under the grant at \$2.50 per acre, as provided in the granting act (R. p. 387).

A. T. Siglin, resided in Coos County since 1871, formerly deputy collector of customs, county treasurer and sheriff, testified that it was generally understood "at the commencement of this grant" that the grant restricted the sales of the lands to \$2.50 per acre, in quantities of 160 acres to an individual, and anybody who went among the settlers and talked with them could have ascertained that fact.

In between 1888 and 1892, Elijah Smith told him that the settlers claimed that they understood from the Coos Bay Wagon Road Company that they were to get the land they had settled upon for \$2.50 an acre, in accordance with the terms of the grant, but that the Southern Oregon Company was an innocent purchaser and was not bound by the original agreement (R. pp. 386-7).

Earl Harlocker, who resided in Coos County since 1871 and worked on the construction of the Coos Bay

Wagon Road, testified that he was acquainted with the settlers in the neighborhood of the wagon road and had talked with them concerning the terms of the grant, and it was always the understanding that the grant limited the quantity of the land that could be sold to each person to 160 acres and the price to \$2.50 an acre; that anybody going amongst the settlers and talking with them could have learned that fact (R. p. 389).

G. W. Stevenson, who resided in the vicinity of the Coos Bay Wagon Road since 1871, testified that he had frequently heard the settlers along the road speak of the limitations of the granting act, restricting the sale price to \$2.50 an acre and quantity to 160 acres, and any person going among the settlers along the road since 1871 would have learned of these limitations from them if he had talked about the road grant at all (R. p. 390).

J. D. Laird, who had resided on the Coos Bay Wagon Road since 1880, testified that he had heard the settlers along the road discuss the grant, and it was generally understood that the company was to sell the land at \$2.50 an acre and in quantities of 160 acres to one person (R. p. 390).

W. R. Murray, who settled on a tract of the grant land in 1886, testified that it was the general understanding in that neighborhood that the company was to sell the grant lands to actual settlers at \$2.50 an acre (R. p. 390).

E. P. Mast, who had resided in the Coos Bay



country since 1872 (266), testified that the people had discussed the government requirement that the grant lands be sold at \$2.50 an acre, in quantities not to exceed 160 acres to one person ever since he came into the country, and that this was understood by every one (R. p. 248).

G. P. Miller, who had resided in the vicinity of the road since 1874, testified that it was the general understanding among the settlers that the grant restricted the sale price of the land to \$2.50 an acre and the quantity to 160 acres to each person (R. p. 391).

J. D. Barker, who settled on a tract of grant lands in 1874, testified that it was the general understanding among the settlers, that the company had to sell the grant lands at \$2.50 an acre and in quantities not to exceed 160 acres to each person, and this had always been the understanding in that country and was a subject of conversation among the people (R. p. 392).

M. J. Krantz, who settled on a tract of the grant land in 1884, testified that it was generally understood among the settlers along the road that the company was required to sell the grant lands at \$2.50 an acre, in quantities of 160 acres to each person (R. p. 393).

D. C. Krantz, who had lived on his homestead, within four miles of the Coos Bay Wagon Road since 1882, testified that it was always understood that the company was required to sell the grant lands at \$2.50 an acre and in quantities of 160 acres to each person, and anybody going among the people and talking with them about the matter would have learned of these limitations in the grant (R. p. 393).

J. L. Crosby, who had resided within the limits of the grant since 1884, testified that it was generally understood among the people, that the company had to sell the grant lands in quantities not greater than 160 acres to a purchaser for \$2.50 an acre (R. p. 394).

J. M. Hutson, who resided on a tract of grant land from 1871 to 1879, testified that it was generally understood and talked among the settlers along the wagon road that the grant required the land to be sold for \$2.50 an acre, in quantities of 160 acres to each purchaser, and this fact would be learned by anybody going amongst the settlers and talking with them about the matter (R. p. 394).

J. S. Clinton, who had resided in the Coos Bay country since 1884, testified that he had always understood that the grant land was to be sold at \$2.50 an acre, in quantities of not more than 160 acres to one person (R. p. 395).

Sarah Haughton, who had resided on a portion of the grant lands since 1874, testified that the settlers along the road generally understood that the company was to sell the grant lands for \$2.50 an acre and in quantities of not more than 160 acres to one person, and this matter was discussed years ago (R. p. 399).

J. C. Wilson, resided in the Coos Bay country for 24 years, testified that the terms of the granting act requiring the sales of the lands at \$2.50 an acre, in quantities of not more than 160 acres to a purchaser, had been a matter of general conversation among the people during the entire period (R. p. 396).

A. M. Simpson, called by defendant, who had extensively operated saw mills in the vicinity of the grant lands since 1856, testified that he had heard the conditions of the grant discussed in relation to the sale of land in quantities of 160 acres and at price of \$2.50 an acre, from the time the wagon road was being constructed. He knew Captain Besse and had seen him at Empire several times (R. p. 396).

T. W. Newland, called by defendant, who had resided in the vicinity of the Coos Bay Wagon Road since 1853, testified he always heard that the company was to sell the grant land at \$2.50 an acre, in quantities of 160 acres, and this requirement of the grant was a matter of general conversation among the people, and if a person went along the road and talked with the people about this matter, he would be informed on these requirements (R. p. 224).

A. W. Johnson, called by defendant, testified that he has resided on the Coos Bay Wagon Road since 1889, and that the requirement of the grant, that the lands were to be sold in tracts of 160 acres at not to exceed \$2.50 per acre, had been discussed by the people in his neighborhood (R. p. 397).

J. J. Clinkinbeard, called by defendant, testified that he had resided in the vicinity of the Coos Bay Wagon Road since 1880; that it was generally understood that the company should sell a quarter section of land to an individual for \$2.50 an acre and anybody going among the people and talking with them would have learned this fact (R. p. 242).

J. A. Haynes, called by defendant, who had resided in the Coos Bay country from 1859 to 1896, testified that, since 1869, the people were familiar with the terms of the grant, that the company should sell at \$2.50 an acre in quantities of 160 acres, and that amongst the settlers located along the line of the road this matter was a subject of conversation (R. p. 239).

George Norris, called by defendant, who had resided in the vicinity of the wagon road since 1868, testified that the requirements of the grant that the land was to be sold in quantities not to exceed 160 acres to one person and at \$2.50 an acre, was a matter of general talk among the people and anybody going amongst them and talking with them about the grant could have learned these conditions (R. pp. 234-5).

W. W. Halverstott, called by the defendant, who had resided on a tract of grant land since 1873, testified that the requirement of the grant that the land was to be sold for \$2.50 an acre, in tracts of 160 acres, was generally understood and talked about along the line of the road and any one endeavoring to discover the status of the land would have learned of this condition if he had gone among these people (R. p. 233).

W. Z. Cotton, called by the defendant, who had resided in the vicinity of the wagon road since 1878, testified that the settlers had discussed the terms of the grant requiring sales of the lands at \$2.50 an acre, in quantities of 160 acres, and a person could have learned these conditions by talking with the settlers along the road (R. p. 226).

S. A. Lawhorn, called by the defendant, testified



that when he came to Oregon in 1870 he heard that a grant had been made to construct a wagon road from Roseburg to Coos Bay and that the land was to be sold at not to exceed \$2.50 an acre, in quantities not exceeding 160 acres. Witness had resided in the vicinity of the grant lands since 1871 (R. p. 232).

J. D. Benham, called by the defendant, who had lived in the vicinity of the wagon road since 1875, testified that the requirements of the grant as to sale of the land at \$2.50 an acre, in quantities of 160 acres, had been a matter of conversation among the people along the road and a person talking with them could have learned these facts (R. p. 230).

I. E. Rose, called by the defendant, who resided within the limits of the grant from 1887 to 1898, testified that he was acquainted with the conditions of the restrictive proviso and anybody who went amongst the people along the road and talked with them would have learned that the grant required that the land be sold at \$2.50 an acre, in quantities not to exceed 160 acres (R. p. 241).

J. P. Stemler, called by the defendant, had heard the restrictive proviso mentioned and also read in the papers that the lands had to be sold at \$2.50 an acre, in tracts of 160 acres (R. p. 225).

J. A. Yoakam, called by the defendant, was employed by the Oregon Southern Improvement Company from 1883 to 1885 and attended to the field work for the company dealing with the settlers; denied ever having heard of the restrictive provisions in the grant,

or that the settlers along the road ever made mention of or claimed under this proviso, and though he resided in the Coos Bay country in the vicinity of the wagon road grant until 1896, he never heard of these conditions in the grant until 1914. Concerning his dealings with settlers on the grant lands he reported sometimes to Elijah Smith (R. p. 279).

S. A. Gurney, called by the defendant, had resided in Douglas County, in the vicinity of the wagon road, during his entire life of 52 years, testified that he had never heard of the restrictive proviso until after this suit was instituted.

W. H. Coats, called by the defendant, who had lived in the vicinity of the wagon road in Douglas County since 1861, testified that he had heard people mention that the grant of land was to be sold at \$2.50 an acre, but never heard of any limitations as to quantity (R. p. 245).

John F. Hall, called by defendant, who had resided in Coos County in the vicinity of the Coos Bay Wagon Road since 1869, testified that he had never heard much discussion of the terms of the grant and first heard the question as to the sale price of the land being \$2.50 an acre, discussed about eight or nine years ago (R. p. 227).

William Bettis, called by defendant, who had resided within the limits of the grant since 1874, testified he first heard of the restrictive proviso about 1900 (R. p. 237).

Thirty-six witnesses testified on this point, twenty-nine to the effect that the terms of the grant were well known to the community, and that no one could go amongst the settlers or discuss the matter of the grant without learning of its terms, and that the settlers believed it the duty of the owner of the lands to sell them in tracts not to exceed 160 acres to one person, and at a price not exceeding \$2.50 an acre; one said that he had heard but one person speak of the terms, another that he had not heard much discussion of the terms, and three, that they had never heard of the matter at all.

In view of the foregoing testimony, it would seem that the officers of the Oregon Southern Improvement Company, and of the Southern Oregon Company, should have known before they purchased, that the Wagon Road Company had no right to make the deeds, two to Miller and one to Besse, or at least, that the title was questioned by the people, yet, they urge that they did not know at that time that the soundness of the title was doubted by anyone.

## **XV.**

### **The Land Could Have Been Sold in 160-Acre Tracts.**

George W. Loggie, former manager of the Oregon Southern Improvement Company, testified that on going among the settlers they informed him when they went on the land Dr. Hamilton promised to give them title at \$2.50 an acre; a number of people came to the office of the Oregon Southern Improvement Company, and later, the Southern Oregon Company and asked if they

were to get their lands for \$2.50 an acre as promised by Dr. Hamilton, and to these people he replied, he was not authorized to sell; while he was with the company from 1885 until 1892, there was not much demand for timber land or for lands along the mountains that were rocky, gravelly and precipitous; from correspondence and conversations with Elijah Smith, he learned he was not to sell any of the property of the company; he reported to Elijah Smith the arrangements that the settlers represented they had with Dr. Hamilton; he was instructed by Elijah Smith to eject the settlers from the grant lands, and, for the purpose of obtaining recognition of the company's title had the settlers sign applications to purchase, and afterwards, collected rentals from them; from statements of the settlers they were willing to pay \$2.50 an acre for the land; in his opinion the company could have sold quite a lot of the bottom lands which was not heavily timbered, for farming purposes (R. p. 381).

Frank Batter, employed by both the Oregon Southern Improvement Company and the Southern Oregon Company, as a field man, testified that in company with Elijah Smith he visited the settlers. He had personally negotiated with the settlers with reference to the grant land they occupied, but had no authority to sell lands and the company never offered to sell lands to anybody; extracts from reports made to the company officials by Batter show willingness on the part of settlers to purchase the grant land in accordance with the terms of the restrictive proviso; a settlement was made with some of these men, but the others were unable to get the land they had settled upon (R. p. 386).



C. T. McKnight, an attorney of Coos County, Oregon, testified to having presented 212 applications of persons who desired to purchase tracts of the grant lands in quantities of 160 acres at \$2.50 an acre; the Southern Oregon Company refused to recognize these applicants, although they were ready to purchase (R. pp. 333-5).

N. Osmundson, deputy county clerk of Coos County, Oregon, testified that there were recorded between 1907 and 1908, in his office, 448 applications to purchase grant lands, practically all of the applications were acknowledged before George Watkins, and were filed by him (R. p. 397).

George Watkins testified to having presented 200 or 300 applications for the purchase of tracts of the grant land, each applicant applying for 160 acres at \$2.50 an acre, to the Southern Oregon Company; accompanying each application was a tender of purchase price; all of these applications were rejected by the company (R. p. 322 et. seq.).

Watkins, as a matter of fact, presented 448, the number which Osmundson said had been filed, for none of the McKnight applications were filed. Therefore, the total number of applicants through McKnight and Watkins is 660.

James S. Howard testified that in 1874 a great portion of the grant was of no value for settlement purposes, only the narrow valleys along the road, and at that time the timber on the grant was not considered of much value, but later it became the chief value of the land.

Isaac Taylor Weekly testified Dr. Hamilton informed him that the grant land would be sold to settlers at \$2.50 an acre and the settlers were told the same thing; these settlers did not get the land they had settled upon; all of the bottom land was taken up in 1887; at this time timber was considered worthless, and heavily timbered lands in the mountains was not taken up in those early days and it could not be sold; near his home there is quite a lot of unsold grant land that would make good homes (R. p. 397).

John Fitzgerald testified that a settler could make a living on 160 acres of the hill land within the grant and mentioned settlers who had established and maintained homes on such lands (R. p. 398).

Earl Harlocker testified that there was no demand for timber land in the mountains between 1871 and 1880, except by settlers who desired it for farming purposes, but the Coos Bay Wagon Road Company *would* not sell it; the demand for timber land began in 1891 (R. p. 389).

W. R. Murray testified that he settled on a tract of the grant lands in 1886, improved it with a house and barn and the ordinary improvements that are placed on a farm, then applied to the president of the company to purchase the land and received a reply that the land was not on the market; in his application to purchase he mentioned no price; in 1887, George Loggie, manager of the Southern Oregon Company, came to this place and ordered him to leave the land, he, desiring it for a home, offered to buy it from Loggie; Loggie told him the land was not for sale; in pursuance to Loggie's

orders he left the place and abandoned his improvements; the company never offered to lease him this land, and it remains unoccupied (R. p. 390).

G. P. Miller testified to unsuccessful efforts made by his father to purchase 160 acres of the grant lands which he had settled upon, from both the Coos Bay Wagon Road Company and the Oregon Southern Improvement Company; also, that as early as 1875 there were quite a few settlers on the grant land who were unable to purchase because the land was not on the market (R. p. 391).

J. L. Barker testified that he settled on a tract of the grant land in 1874, and was told by Dr. Hamilton that the company was not permitted to charge more than \$2.50 an acre for the land; relying on this statement he made improvements on the place worth \$600 or \$700 and later applied to Dr. Hamilton to purchase it, but was informed that the land was involved in a law suit; he subsequently unsuccessfully applied to Metcalf and Yoakam to purchase this land; in 1892 he explained to Elijah Smith the understanding he had received from Dr. Hamilton, but was never able to purchase the land; he was willing to pay \$2.50 an acre for the land; he finally leased the land from the company; the Wagon Road Company sold land at one time, but later did not (R. p. 392).

M. J. Krantz testified that he settled on a tract of the land in 1882, being encouraged so to do by Dr. Hamilton; he made unsuccessful efforts to purchase this land both from Dr. Hamilton and subsequently Elijah Smith, and from the latter he received the reply that the company could not dispose of the land; he was

willing to purchase at \$2.50 an acre; he left the land after residing on it for about 14 years and making improvements worth \$4,000 (R. p. 393).

J. L. Crosby testified that about 1884 his father settled on a quarter section of the grant land and attempted to purchase it from the Oregon Southern Improvement Company, offering \$2.50 an acre, but his application was rejected, the company stating that they were not ready to sell; his father placed improvements upon this land worth at least \$1,000 and finally moved away as there was no prospect of being able to purchase; after his father left, witness remained on this land and unsuccessfully attempted to purchase it, and finally, being given to understand that he could not purchase the land, he entered into a lease with the company (R. p. 394).

J. A. Cotton testified that about 1906 he settled on a small tract of the grant land and made improvements worth about \$300 (414); the following year he applied to Elijah Smith to purchase the land and was informed that the land was off the market; in 1912 was informed by Mr. Armstrong that when the land was on the market he would be given a chance to purchase; and now leases the place for \$25 a year (R. p. 226).

W. F. Burton testified that he had settled on 160 acres of the grant land in 1880, being told, prior to the settlement, that the land would be sold in tracts of 160 acres at \$2.50 an acre; afterwards, the Oregon Southern Improvement Company offered to sell him the land at \$10 an acre for bottom land and \$5 an acre for hill land; he replied to this offer that he understood the land was to be sold for \$2.50; he purchased 53 acres for \$200;



later he unsuccessfully made application to purchase 9 acres of land from the company; the mountain lands in the grant that are heavily timbered, high, precipitous and rocky he did not think could be sold between 1875 and 1880, but had no experience in selling land (R. p. 398).

J. D. Laird testified that the timbered lands in the mountains was not worth much after the timber was removed, though some of it might be used for range. Farm land in the community in which he lives is worth about \$200.00 an acre (R. p. 399).

E. P. Mast testified that he settled upon a tract of the grant land in 1873, and in 1875 applied to Dr. Hamilton to purchase it, but was informed that the land could not be sold at that time; later, Metcalf of the Southern Oregon Improvement Company proposed to sell the land upon which people had made improvements, at an appraised value, but most of the people were afraid of the title so few of them purchased the land; witness purchased the land he had settled upon at \$3 an acre. The mountain and hill land, so far as witness knew, could not be sold in 1872 in tracts of 160 acres, but he knew of no efforts of the Coos Bay Wagon Road Company to sell the land (R. p. 248).

J. M. Hutson testified that in 1871 he settled on 160 acres of the grant land and later applied to Dr. Hamilton to purchase it, but was informed that the company was not ready to sell (163-164), but that the company was required to sell the land for not more than \$2.50 an acre; relying upon these statements he made improvements on the land worth \$1,000, but left the place

in 1879 because the company would not sell to him, the reasons stated always being that the patents had not been issued, or something of that nature; all of his dealings were with Dr. Hamilton; other people who settled on grant land had the same experience as himself (R. p. 394).

J. S. Clinton testified that he settled on a small tract of the grant land in 1905 and attempted to purchase this land from the Southern Oregon Improvement Company at \$2.50 an acre, but Elijah Smith refused to sell; prior to applying to purchase he leased this land from the company. W. H. Harmon, in his presence, also applied to purchase a small tract of this land and was also refused by Elijah Smith (R. p. 395).

A. J. Radabaugh testified that in 1885 he and his brother applied, each, for 80 acres of the grant land, offering \$2.50 an acre, and this application was refused by the Oregon Southern Improvement Company, who offered them the land at \$3 an acre; he now has 80 acres of this land leased at \$10 a year. Witness mentioned several witnesses residing on mountain land as early as 1875, and stated, in his vicinity, the mountain land was now all taken up (R. p. 399).

Sarah Haughton testified that she, with her husband, now dead, settled on a tract of the grant land in 1874, and after putting improvements on it her husband endeavored to purchase the land of Dr. Hamilton, but was informed that the company would not sell the grant land in small tracts, desiring to keep it intact and sell the whole. Her husband desired to purchase 160 acres, and had the means to pay for it; they had built a com-

fortable home on the place and used about 30 acres of the land for agricultural purposes and made their living for themselves and seven children from the land. After this her husband made efforts to purchase from the successors of the Coos Bay Wagon Road Company and was ready to pay \$2.50 an acre for it. About 1894 the Southern Oregon Improvement Company brought suit to eject them from the land, and as a result, the sheriff came to their place and cut through their house as shown in photographs. Prior to this time, Shine, the manager of the company, told her husband that the company wanted to keep the land intact and did not want to sell it in small tracts (R. p. 399).

J. C. Wilson testified that he had been attempting for the last 24 years to purchase 160 acres of the grant land; at one time made application to Shine, manager of the company, for 160 acres, offering \$2.50 an acre; Shine replied that the company had no land to sell; he offered to settle on the land and was informed he would be a trespasser; made another application to purchase another 160 acres, offering \$4 an acre and received the same reply as he did to his first application; the land he first applied to purchase was fine agricultural land (R. p. 396).

A. T. Siglin testified that the boom in timber commenced about 1900, but prior to that time any good timber that could be logged into the Coquille River or tide water was in demand.

He also said, that if the different companies, including the Wagon Road Company and the defendant, had been willing to sell the land within the terms of the

grant it could have been readily disposed of, or at least the greater portion of it; that some years ago he knew that people along the road were willing and anxious to purchase (R. p. 387).

Robert E. Shine, formerly manager of the Southern Oregon Improvement Company, called by the defendant, testified there was no demand for mountain timber lands for some years subsequent to 1888, and about 1900, when eastern buyers appeared, timber values became attached to the lands. At the time he went into the employ of the company (in 1888) the timber lands *on the mountains* could not be sold in 160-acre tracts to anybody at any price. *The reason Elijah Smith did not sell timber land was because he decided to keep the tract until they were prepared to operate it themselves.* A great many people sent applications to purchase a small piece of the grant land generally adjoining their home farm; the company would reply that when it was ready to sell the applications would be considered. Several applications were made by people who subsequently leased. Under instructions from Elijah Smith, he told applicants to purchase the lands, that the company was not selling; applications to purchase grant land was made to Elijah Smith and were rejected by him (R. p. 294).

Note:—It will be observed that his statement that lands could not be sold in 160-acre tracts, refers to mountain lands.

J. A. Yoakum, formerly an employe of the Oregon Southern Improvement Company from 1883 to 1885, called by the defendant, testified that in his interviews



with settlers on the grant lands, they informed him of the promise of Dr. Hamilton that they would get the land they had settled on, but none of them mentioned the price; his instructions were to sell to the purchasers who desired to purchase it at such a price as was proper in his judgment; the company had a general charge of \$10 an acre for bottom land and \$3 an acre for hill land in 1885. At the time he worked for the company the timber land had no value except along the rivers and creeks; rocky timbered hillside land situated a mile and a half from sloughs and water during this period could not be sold for \$2.50 an acre in 160-acre tracts or for any sum or in any quantity, as a person could get unsurveyed government land for nothing (R. p. 279).

Note:—Unsurveyed government land was not on the market for any price.

Herbert Armstrong, called by the defendant, vice-president and manager of the Southern Oregon Company since 1911, testified he had received a good many applications to purchase bottom lands (R. p. 299).

T. J. Thrift, assessor of Coos County, called by defendant, testified that he had been in the assessor's office for 16 years and during the first years of his work in this office *timber* lands were considered almost absolutely worthless. The first timber operations and demand for timber started in that country about 1900; since that time the timber land has become valuable. The grant lands are largely timber lands and more valuable for timber than for any other purpose (R. p. 229).

A. M. Simpson, called by the defendant, testified that from 1869 to 1875 the timber on the mountain sides had no value except for speculative purposes at \$1 to \$3 an acre, according to the quality, and *mountain* land in 160-acre tracts during these years could be sold only to speculators (R. p. 396).

T. W. Newland, called by the defendant, testified that he was acquainted with the grant lands from Roseburg to the top of the Coast Range, and in 1873 all the land that was not occupied was of poor quality and he did not think the grant land could be sold between 1869 and 1870 in tracts of 160 acres, because he never heard of anybody wanting it or offering anything for it. *Witness had resided, and raised a family on his farm, within the limits of the grant, since 1875* (R. p. 224).

S. A. Gurney, called by the defendant, testified that between 1869 and 1876 he did not think any of the *rocky, hilly* land could be sold to anybody in tracts of 160 acres at any price, except a small piece adjoining land owned by individuals. Witness was a farmer and had resided within the limits of the grant since 1853. The timber excitement began about 1900 and all of the contiguous government land was then entered (R. p. 244).

W. H. Coats, who had resided within the limits of the grant since 1861, called by the defendant, estimated that one-tenth of the grant land now owned by the defendant was suitable for settlement purposes, and that nine-tenths could not have been sold at any price in 160-acre tracts between the years 1859 and 1879, but

said he had nothing to do with the sale of the wagon road lands, and did not know whether the company had applications to purchase (R. p. 245).

J. J. Clinkinbeard, called by the defendant, testified that the Coos Bay Wagon Road Company was selling land in 1875, but took the land off the market about that time and sold no more. He understood the land was taken off the market and that neither the Coos Bay Wagon Road Company, the Oregon Southern Improvement Company or the Southern Oregon Company had offered the land for sale. He had heard men say that they wanted to buy grant lands but were unable to, and it was generally understood that the land was not on the market. He never heard of any demand for *hill* timber land in 160-acre tracts between 1875 and 1880 or of anybody purchasing such lands during this period (R. p. 242).

L. D. Smith, called by the defendant, testified that barren or *timbered* hill lands could not be sold prior to 1875 at any price. The first demand for timber was in the summer of 1883, and *after this* a *lively* demand developed for timber (R. p. 228).

A. E. Bushnell, called by the defendant, resided within the limits of the grant in Douglas County since 1859, testified that the grant lands could not be sold in 160-acre tracts at any price in 1869. The government timber lands were not entered until within the last 12 or 15 years. He knew very little about the timber business or whether the Southern Oregon Company had attempted to sell, or whether anybody had attempted to purchase the timbered land (R. p. 248).

A. W. Johnson, called by the defendant, had been acquainted with the lands in Township 28 S., R. 8 W., since 1889, testified this land had never been settled upon and but very little of the government land taken up. There seemed to have been no demand for the grant land in tracts of 160 acres prior to the timber excitement in 1900. He was not connected with any of the companies; did not know whether they had received applications to purchase, and for aught that he knew the reason the land was not sold was because the owners did not want to dispose of it (R. p. 398).

John F. Hall, called by the defendant, who had resided in Coos County since 1869, testified that there was no demand for timber in the Coos Bay country except that adjacent to tide water between the years 1870 and 1880 and he did not think the *mountain* land could have been sold during this period at any price. The first flurry in timber was in 1883. After the lands were transferred to the Oregon Southern Improvement Company there were a number of people who wanted to purchase and were willing to pay \$2.50 an acre, but were unable to get the land (R. p. 227).

I. E. Rose, called by the defendant, testified there was no demand for timber in 1877 and that the timber land embraced in the grant could not be sold at that time to anybody in quarter sections. He did not know the lands had been withdrawn from sale by the Coos Bay Wagon Road Company. There was considerable feeling against the Coos Bay Wagon Road Company for not selling the land; settlers had built little homes and had cleared tracts of land where they made their



living and their homes; a good many of these men were never able to get these lands (R. p. 241).

J. A. Haynes, called by the defendant, testified that from the date of the construction of the road, for about 10 years, there was no demand for *mountain* timber lands and he did not think such lands could be sold in tracts of 160 acres or less, for cash, during this period and lands of the character were not taken up during this period. He purchased 160 acres of the grant land in 1873 for \$1.25 an acre, which he resided upon and cultivated. Ever since this purchase the lands have been out of the market, and the Coos Bay Wagon Road Company and its successors have absolutely refused to sell any of the land (R. p. 239).

J. P. Stemler, called by the defendant, testified that there was no demand for timber in the Coos Bay country in 1885, and it was then considered a nuisance, and at that time *mountain* timber land could not be sold in 160-acre or smaller tracts. He had never attempted to sell any of such land except during the last three or four years. The first demand for timber in that country was about 1900 (R. p. 225).

William Bettis, called by the defendant, testified there was no demand for *hill* timbered lands in the Fairview district along the wagon road between 1874 and 1880, and he did not think the *timber* land in the grant could be sold in tracts of 160 acres or less, for money, during that period. The demand for timber started about 1900. He never had anything to do with selling land for the Wagon Road Company, and knows nothing about applications to purchase the land except

within the last few years. Shortly after 1874, the Coos Bay Wagon Road Company took the grant lands off the market; the reason he knew this was that there were other wagon road lands in his neighborhood, and people came into the country, and if the land had been on the market there would have been neighbors settled close to them, and this impressed the matter on his mind. He knew the Coos Bay Wagon Road Company did not sell the land to anybody after its withdrawal from sale, and the policy of the other owners of the land has been the same; with the exception of a few tracts no sales have been made since that time, either by the Wagon Road Company or its successors (R. p. 236).

George Norris, called by the defendant, testified that from the time he went into the country (1868) until 1880, there was no demand for timber land and he did not think the timber lands on the *hills* could be sold in 160-acre tracts during this period. He had heard of people trying to buy some of the grant lands they had settled upon situated along the river creeks and bottoms, but were *unable* to get it. He had nothing to do with the sale of the grant lands and knew nothing about the applications that might have been made to the company for the land (R. p. 234).

W. W. Halverstott, called by the defendant, testified he purchased a quarter section of the grant land at \$2 an acre in 1873; there was no demand for *timber* between 1873 and 1880 that he knew of; he knew of no sale of *mountain* timber lands in tracts of 160 acres between 1873 and 1880. Upon the land he purchased from the company he raised a family of six children (R. p. 232).

L. A. Lawhorn, called by the defendant, testified that from 1871 to 1880 he knew of no lands being taken up on the *hills* except in connection with bottom lands; from 1871 to 1878 there was no demand for *timber* land and no market for timber, and during these years he did not think the timbered grant lands upon the *hills* could be sold in 160-acre tracts for any sum. The timber excitement began in that country about 1900 (R. p. 231).

J. D. Benham, called by the defendant, testified that when he moved into the limits of the grant in Coos County in 1875, there was no demand for *timber* and at that time the timber lands in the *hills* could not be sold for cash. He had never been engaged in selling timber, his occupation being that of a farmer. He knew of several parties who wanted to buy grant land, one of whom succeeded and the remainder did not, but he did not know the reason (R. p. 230).

A number of photographs were introduced by the government for the purpose of showing that settlers on the wagon road land had made substantial improvements, and had built for themselves comfortable homes (Govt. Ex. 3-4-5-12-14-15-16-17-18-19-20-21-36, R. p. 529).

A. M. Simpson testified that in 1910 he purchased a section of the grant lands (Sec. 23, Twp. 26 S., R. 12, West), for which he paid \$19,000 (R. p. 396).

Plats introduced in evidence, by defendant, showing the disposition of public lands within the grant (Deft. Ex. 1 to 14 inc., R. p. 315), and a certificate from the State Land Board (Deft. Ex. 177, R. p. 537), setting

forth the disposition of school lands within the limits of the grant, show a constantly increasing demand for lands in small tracts since and prior to the granting act.

The fair deduction from all the foregoing testimony is, that the Wagon Road Company took the land off the market and refused to sell, and that this in general was the policy of the Oregon Southern Improvement Company and the Southern Oregon Company; also, that if the different companies had been willing to sell they could have disposed of a very large part of the land.

## **XVI.**

### **The Character of the Land.**

Considerable testimony was introduced by the defendant upon the character of the land for the purpose of showing that it was impossible to make sales of the land within the terms of the restrictive proviso. The government objected to it all upon the ground that it was immaterial and irrelevant. These objections we still insist upon. Not knowing what the ruling of the court would be upon the objections, the government called, in rebuttal, a number of witnesses upon the same subject. We give below an abstract of the testimony of the witnesses called by both parties.

George W. Loggie, manager of the company from 1885 until 1892, testified that he had examined the grant lands sufficiently to become familiar with their general character; in his opinion 60 per cent of the land of the company could be cultivated after it was cleared, and



15 per cent could be cultivated in its natural condition; estimated the cost of clearing the timbered land from \$60 to \$100 an acre. Had experience in clearing land (R. pp. 381-2).

Almon S. Buell, residing near the Coos Bay Wagon Road in Douglas County from 1870 to 1887, testified that when cleared the bottom land would make fine agricultural land and the mountain land could be used for grazing (R. p. 400).

A. T. Siglin, a resident of Coos County since 1871, formerly Deputy Collector of Customs, County Treasurer and Sheriff, testified that he had been over the different parts of the land and estimated that 90 per cent of the land was susceptible to tillage and fruit raising, and that 10 per cent of the lands were worthless. In his estimate he included lands that could be utilized after clearing (R. p. 387).

Earl Harlocker had resided in Coos County since 1871 and had been Statistical Correspondent for the United States Agricultural Department for 30 years and had classified the lands of Coos County, testified that 90 per cent of the grant lands were tillable after clearing, and he had so reported to the government, and 10 per cent was barren. In the present condition, witness estimated that only 5 per cent of the land could be cultivated, but this is so, he said, because you cannot cultivate until you clear the brush (R. p. 389).

J. D. Laird, who had resided on the wagon road since 1880, testified that the land on the *mountains* in the timbered area was not worth much after the timber

was removed, but some of it might be used for range (R. p. 398).

Isaac Taylor Weekly, an old resident within the limits of the grant, testified that there was quite a lot of unsold lands near his residence that would make good homes (R. p. 397).

W. R. Murray, who had resided within the limits of the grant since 1886, estimated that 75 per cent of the grant lands could be used for pasture and farming after clearing (R. p. 391).

G. P. Miller, who had resided within the limits of the grant from 1874 to 1895, testified that one-fifth of the grant in Coos County was good farm land, and the remainder would make fine grazing land after the timber was removed; a portion of the land which could not be farmed would be suitable for fruit raising (R. p. 392).

J. L. Barker, who had resided within the limits of the grant in Coos County since 1874, testified that some of the timber land could be cultivated, but was unable to say what percentage was bottom and what percentage was hill land (R. p. 392).

W. F. Burton, who has resided within the limits of the grant since 1879, testified that he was acquainted with the lands over the *mountains* and that they were heavily timbered, high, precipitous and rocky (R. p. 398).

J. M. Hutson resided on the grant land from 1871 until 1879, testified that the hill land within the limits of the grant, in his vicinity, could be used for pasture after the removal of the timber (R. p. 395).

J. A. Yoakum, employed by the Oregon Southern Improvement Company from 1883 to 1885, called by the defendant, testified that he had been over the lands of the Coos Bay Wagon Road Company in dealing with the settlers; about 3 per cent of the land was bottom land and the remainder of the grant was composed of burned off land worth nothing; some good timber land; some rocky land and some moderately good land. He estimated the cost of clearing the bottom land at \$50 an acre and the hill land at \$250 an acre (R. p. 279).

T. J. Thrift, called by the defendant, County Assessor of Coos County for the past 12 years, testified that 90 per cent of the grant lands could be rendered tillable by clearing (R. p. 229).

S. A. Gurney, called by the defendant, resided in Douglas County within the limits of the grants 52 years, testified that he was acquainted with the grant land between Roseburg and the top of the Coast Range, and not more than one-tenth of the area within the place limits could be cultivated, excluding Looking Glass and Flournoy Valleys, and the other nine-tenths, assessed as grazing land, is brushy and rocky with some scattering timber (R. p. 243).

W. H. Coats, who had resided in Douglas County within the limits of the grant since 1861, called by the defendant, testified that he was familiar with the grant lands on the south side of the road from Roseburg to summit of the Coast Range, and of the unsold grant lands one-tenth is suitable for grazing, and very little of this could be cultivated, and nine-tenths was rocky and covered with timber and brush, not suitable for

settlement purposes (551), and not of much value (R. p. 244).

J. A. Cotton, called by defendant, testified that he did not know the boundaries of the grant and had never seen the grant. When asked what proportion of certain land described to him was bottom land, he replied, "Pretty hard question to answer. I could not say what it was, possibly one-twentieth" (R. p. 225).

A. E. Bushnell, called by the defendant, has resided within the limits of the grant since 1859, testified that he was familiar with the lands within the place limits of the grant from Roseburg to the top of the Coast Range, and that the tillable land would average about one acre to a section; the remainder of the land would be rough, hilly and of no use for any purpose. Though there was some timber on the land it was not sufficient to make it valuable. The worthless lands of the grant extend from Reston to Brewster Valley, a distance of 14 miles (R. p. 245). The road is about 65 miles long.

A. W. Johnson, called by the defendant, who has resided along the wagon road in Douglas County since 1889, testified that he was acquainted with the grant lands in Township 28 S., R. 8 W., commencing at the foot of Sugar Pine mountain and extending to the top of the Coast Range; all this land being in a mountainous, rough country, was covered with brush and timber and very heavy, and it has very little grass growing on it (R. p. 397).

J. J. Clinkinbeard, called by the defendant, testified that 10 per cent of the grant lands was bottom land



and the remainder timber lands, the latter being quite broken in some places and very rocky; the greater portion is free from rocks (R. p. 241).

L. D. Smith, called by the defendant, had lived within the limits of the grant in Coos County since 1865; he had been over the wagon road a good many times and over a portion of the lands embraced within the limits of the grant; had never made an examination of the land for the purpose of classifying its character; the grant was composed of bottom, hilly, rocky and timber land; the portion of the bottom land, which is good land, is so small that he could not make a guess as to what it was, and it was found only along the creeks (R. p. 227).

I. E. Rose, called by the defendant, who resided within the limits of the grant from 1877 to 1889, testified that very little of the land was bottom land and the remainder was hill land, some of it precipitous and broken (R. p. 240).

J. P. Stemler, called by the defendant, had resided within the limits of the grant since 1885, testified that from Dora (Coos County) to the 18 mile house in Douglas County there was very little bottom land within the limits of the grant, and the country was rough, hilly and broken. Only knowledge of lands gained from traveling over roads from which not very much of land could be seen (R. p. 224).

Wm. Bettis, called by the defendant, had resided within the limits of the grant since 1864, testified that a small portion of the grant was bottom land, and a

good portion of it was timber land, a portion of it carried no merchantable timber. Never examined lands of grant for purpose of determining their character (R. p. 237).

George Norris, called by the defendant, resided within the limits of the grant in Coos County since 1868, estimated that 75 per cent of the grant was hill and timber land; the hill land was sloping with small level benches covered with timber in some places; a great deal of the land adjacent to the bottom land could be used for grazing if cleared; the bottom land is very desirable (R. p. 234).

W. W. Halverstott, called by the defendant, resided within the limits of the grant since 1873, testified that but a very small portion of the grant he had been over was bottom or bench land and the remainder was hill land covered with more or less timber; his knowledge was gained from travel over the road between Roseburg and Marshfield; in many places along the road he could see only a few rods away; he had been over very little of the land (R. p. 232).

L. A. Lawhorn, called by the defendant, has lived within the limits of the grant in Coos County since 1871, estimated that one-fourth of the grant within the place limits was bottom land, nearly all of which was taken up in the early days; in addition to the hill and bottom land there is some bench land within the limits of the grant which is good for grazing, but not staple crops; a very small portion of the hill land if cleared would be tillable (R. p. 231).

Defendant offered in evidence reports on timber cruises covering unsold grant lands in Douglas County, based upon examinations made since the institution of this suit by George Gothro while an employe of defendant; also reports of cruises of unsold grant lands situated in Coos County, based upon cruises made under the direction of the officials of Coos County for tax assessment purposes.

A summary of these exhibits is as follows:

GOTHRO CRUISES OF GRANT LANDS IN DOUGLAS COUNTY.

Grazing .....	11,934 acres
Sheep range .....	832 "
Cultivation .....	1,122 "
Part cultivation .....	975 "
Not classified .....	1,760 "

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Total .....	16,623 acres
In bill not cruised.....	1,760 acres
Timber .....	293,416,000 feet
(Deft. Exs. 15 to 52, 178, 180 to 189; R. pp. 536-7).	

COUNTY CRUISE OF GRANT LANDS IN COOS COUNTY.

Grazing .....	27,860 acres
Poor grazing .....	5,780 "
Cultivation .....	14,980 "
Part cultivation .....	12,330 "
Agricultural .....	1,320 "
Part agricultural .....	200 "
No value .....	3,120 "
Little value .....	4,280 "

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Total .....	69,870 acres
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In bill not cruised.....	4,660 acres
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Total .....	74,530 acres
Timber .....	2,065,665,000 feet
Total cruised in bill (Coos).....	16,623 acres
“ “ “ “ (Douglas).....	69,870 acres
<hr/>	
Total .....	86,493 acres
Total timber .....	2,359,081,000 feet
(Deft. Exs. 53 to 176; R. p. 536).	

Nearly all the witnesses, called by the defendant, upon the character of the land, knew nothing about it except what they learned as they passed along the road or in occasional hunting trips over it. Against their testimony, consider the cruises made by men who traveled over every quarter section at least. Even the cruise made by Mr. Gothro, an employe of the company, makes a better showing for the cultivable character of the land than the testimony of defendant's non-cruiser witnesses.

## XVII.

### **The Contention of the Defendant That the Restrictive Proviso is not Applicable, Because of the Character of the Land, is not Supported by the Testimony.**

Congress inserted the proviso, knowing the character of the land.

The bill which finally became the granting act of March 3, 1869, was introduced in the Senate by Senator Williams of Oregon. Upon consideration in the Senate debate was had as follows:



I have a map here, and can exhibit the condition of the country and the situation of the points referred to if the Senator desires to look at it; but I will state to the Senator that Roseburg is the county seat of Douglas County, and the chief town of the Umpqua Valley. It is surrounded on all sides by mountains. This bill proposes to assist in the construction of a road from Roseburg to the navigable waters of Coos Bay through the Coast Range of mountains, so that there may be access to the ocean from Roseburg through the mountains. It is a very difficult and expensive road to construct, and it is very necessary to the people that they should have this way of egress and ingress. The distance is a little more than fifty or sixty miles.

There are *some small valleys* in the mountains in *which* the land *may* be worth *something*, and it is possible that there may be some timber on the mountains that may be used by the state in the construction of this road with advantage. \* \* \* (Italics mine).

Mr. Hendricks said:

\* \* \* The road will be a costly one to build and the *lands* for a very *considerable* distance in the mountains will *not be* of *value*. \* \* \* It (the road) will be mainly through a region of country that is not now inhabited, and that it will be *difficult* to *settle* perhaps, but it will connect a desirable part of the country with the coast. The bill passed (second session of the fortieth

Congress, Cong. Globe, pp. 249-250).

In the House of Representatives Mr. Julian moved this amendment:

Provided, that the grant of lands hereby made shall be upon the condition that the lands shall be sold to *actual settlers* only in quantities not greater than one quarter section and for a price not exceeding \$2.50 per acre (*Italics mine*).

Mr. Mallory, Congressman from Oregon (a member of the law firm representing the Oregon Southern Improvement Company and Southern Oregon Company from their organization down to his death a few months ago) (*Id.* 1074), remarked:

I am sure that if the House understood this bill there would be no objection to it. Those who are acquainted with the geography of the State of Oregon know that along the line of the coast there is a high range of mountains known as the Coast Range. Between that range of mountains and the Cascade Mountains there is a succession of valleys. \* \* \* *A large portion of the land proposed to be granted is not worth anything.* Most of it lies on this range of mountains and *could not be sold for one cent an acre.* Some of it may be valuable in the construction of this road. \* \* \*

In the valley of the Umpqua there is a considerable settlement, and at the Coos River, on the coast, there is another settlement; but along the line extending about sixty miles it is an *unbroken wilderness.* \* \* \*

The grant is made to the State of Oregon, and it is to be controlled by the Legislature. I have *no objection* to the amendment offered by the gentleman from Indiana (*Italics mine*).

Mr. Julian, with the consent of the House, modified his amendment by adding after the words "a quarter section" the words "to each person," and the amend-

ment as modified was passed (second session, fortieth Congress, Cong. Globe, pp. 1820-1821).

The bill was returned to the Senate; but the House amendment, as laid before it, did not contain the words "actual settlers." How they came to be dropped is not disclosed by the record, but Mr. Julian's amendment, with the exception of these two words, was adopted and the bill became a law.

### **XVIII.**

#### **The Defense of Res Judicata is Untenable.**

According to the answer there were two suits commenced on February 29, 1896, one on August 25, 1897, and one on February 18, 1896. These suits are numbered, respectively, 2284, 2283, 2406 and 2278 (Deft. Exs. 240-1-2-3; R. pp. 410 et. seq.).

No. 2284 involved 30,044 acres of land and was based upon the theory that the lands were outside of the grant limits and had therefore been erroneously patented to the Wagon Road Company.

A demurrer to the bill was sustained and the action dismissed. There is nothing in the record of the case to show upon what ground the court rested its decision.

An official communication from the District Attorney May 21, 1897, to the Attorney General, states "the demurrer has been argued and the court has sustained the same, holding that the United States were in no wise interested in this matter; that the real party at interest was the Oregon and California Railroad Com-

pany, the prior claimant, and that the suit should be brought in the name of the Oregon and California Railroad Company; that if the government were to recover in the present litigation it would gain nothing thereby, and lands patented to the Coos Bay Wagon Road Company by the terms of the grant to the Oregon and California Railroad Company would immediately go to said latter company in case the government was successful in this litigation" (Govt. Ex. 86, R. p. 437).

Suit No. 2283 covered the same land as suit 2406. To defendant's answer, complainant filed a replication, to which defendants demurred; the demurrer was sustained and the bill dismissed.

Judge Bellinger in suit 2406 held the decision was a nullity. He said:

It goes without saying that there is no such thing as a demurrer to a general replication; such a replication is a mere formal matter and has the effect to put the case at issue, and there can be, thereafter, no judgment without the trial of the question of fact so presented. The general replication was in proper form, the form adopted in Story's Equity Pleadings, if it had been otherwise, and liable to objection, nevertheless, there could be no decree dismissing the bill on that account. I am of the opinion that the demurrer attempted to be pleaded is a nullity, but if it is not a nullity it is clearly not a decree upon the merits, and is, for that reason, not a bar to this suit (R. p. 499).

Suit 2406 was against the Coos Bay Wagon Road Company alone. The bill alleged that the lands were outside of the grant, except as to 40 acres, and that



the company had sold them. The prayer was that an accounting be had for the lands sold, and that the patent to the 40 acres be cancelled. The prayer was granted and judgment entered in favor of the plaintiff for \$1,099.59.

Suit 2278 involved 40 acres of land. The bill alleged that the lands had been homesteaded before the grant attached, but the facts disclosed by the bill were held, on demurrer, to be insufficient to sustain the claim, and the bill was dismissed.

These suits were instituted a long time after defendant purchased.

## **XIX.**

### **Defendant is not a Bona Fide Purchaser.**

Under the head "The defendant had actual knowledge of the terms of the grant and of the breaches" (Supra, p. 42) are set out the admissions of the answer, the recital of the patents, the recital of the deeds, the knowledge in the community of the terms of the grant, the belief on the part of the people in the community that the owner of the land was bound to sell them in tracts of 160 acres, and at price not exceeding \$2.50 per acre.

The admissions and the testimony show conclusively that the defendant company had actual knowledge of the terms of the two granting acts, of all the breaches which had taken place before it purchased, and that its officers, in common with the other members of the

community, must have known, before it purchased, that the title was in question.

#### OTHER TESTIMONY BEARING ON THE POINT.

Captain William H. Besse, the grantee in the deed from Crocker for the 35,533.93 acres and in the deed from the Coos Bay Wagon Road Company for the 61,133, was acting in the transaction for the Oregon Southern Improvement Company. Rotch so testifies (Rotch, R. p. 276).

Government's Exhibit 40 (R. p. 531), being the cash book of the Oregon Southern Improvement Company, shows that Besse's expenses from October 1, 1882, to February 1, 1884, in the sum of \$2,157.89, were paid by that company.

The amendment to page 38 of the answer states that Russell Gray, one of the grantees, had no interest in the property, but took the title solely for the benefit of the Oregon Southern Improvement Company.

The witness Crapo testified that he caused a man by the name of Foster, an experienced timber cruiser, to go to Oregon and examine the lands. Foster did so and reported to the investors before the purchase of the lands was completed (Crapo, R. p. 277). Rotch testified that Foster made a voluminous report, and that he, Rotch, as treasurer of the company, paid him for his services (Rotch, R. p. 277). This investigation of the lands was made before the Oregon Southern Improvement Company completed the purchase.

It is strange that so much attention should have

been given to the character of the land, and little or no attention to the title, if we are to accept as true the testimony that the promoters knew nothing about the granting act or its terms.

In addition we have a letter from Elijah Smith, by Prosper W. Smith, his brother, written in May, 1885, to Metcalf, manager of the Oregon Southern Improvement Company, in which he states "we think you are right in your idea of charging them (settlers) a fair valuation for the land; we do not think that we should sell the land at \$2.50 an acre if it is worth \$10.00, and we don't see what we have to do with the Wagon Road Co.'s promises" (Govt. Ex. 76, R. p. 535).

On January 30, 1885, Metcalf wrote to Elijah Smith that there were a number of settlers on the lands who had been encouraged to settle on them by the promise of the old Wagon Road Company to sell at \$2.50 an acre; that he was charging them \$10.00 an acre for bottom land and \$3.00 an acre for hill land; also "I propose to be easy with these settlers, as whatever they do on the land enures to our benefit eventually" (Govt. Ex. 78, R. p. 535).

This was two years before the Southern Oregon Company acquired title. Elijah Smith was one of the chief promoters of that company, as well as an officer of the Oregon Southern Improvement Company, and he figures very largely in the affairs of the Southern Oregon Company.

The two letters show that long before the Southern Oregon Company acquired the title, Mr. Smith and the

general manager of the Oregon Southern Improvement Company knew the terms on which the Wagon Road Company had agreed to sell to the settlers, and knew, too, that the settlers were insisting on compliance with the terms of the grant.

William Rotch, called by the defendant, formerly Treasurer of the Oregon Southern Improvement Company, testified that *stock* of that company was issued *only to persons who purchased bonds*, and all bonds issued were accompanied with stock of the same par value (Rotch, R. p. 276); that prior to the foreclosure proceedings under the trust deed to the Boston Safe Deposit and Trust Company, Rotch and Mandell were substituted as trustees. The reason this foreclosure took place was because the company was unable to pay its obligations and could obtain no money to carry on their business. The property was purchased in the foreclosure sale by the father of witness, William Rotch, and William Crapo, acting for the bondholders, who after purchasing, transferred the property to the Southern Oregon Company (R. p. 276). The property was paid for by issuing stock of the Southern Oregon Company. The stockholders of the Southern Oregon Company received a little more stock than was represented by the par value of their bonds in the Oregon Southern Improvement Company; practically all of the stockholders of the Oregon Southern Improvement Company were identical. Rotch designated the foreclosure proceedings and the organization of the Southern Oregon Company as the "re-organization" (Rotch, R. p. 276).

P. W. Smith, treasurer of the Oregon Southern Improvement Company, in a letter under date of May



6, 1887, referred to the foreclosure proceeding as the "re-organization" (Govt. Ex. 76, R. p. 535).

Elijah Smith, president of the Oregon Southern Improvement Company, under date of April 14, 1886, outlines the method of procedure in the foreclosure proceedings and purchase of the property by the bondholders (who were also the stockholders), at a nominal price; instructions are given with reference to the foreclosure proceedings( Govt. Ex. 75, R. p. 534).

By letter of October 7, 1886, P. W. Smith, treasurer, instructs James Webster, secretary of the Oregon Southern Improvement Company, to furnish information to C. A. Dolph, who had charge of the foreclosure proceedings (Govt. Ex. 79, R. p. 535). Elijah Smith, June 17, 1887, informed C. A. Dolph that Loggie would bid at the foreclosure proceedings for the bondholders' committee and the minimum bid would not be over the bonded indebtedness.

C. A. Dolph, June 10, 1887, informed Elijah Smith with reference to the foreclosure proceedings, that the only money necessary to be advanced by the bondholders would be the costs of the foreclosure, and expressed the understanding that the property was to be purchased with the outstanding bonds of the Oregon Southern Improvement Company, and such bonds were then to be cancelled, advised that the property should be bid in at the foreclosure sale by a person having no connection with the Oregon Southern Improvement Company (Deft. Ex. 205, R. p. 538).

Elijah Smith, by P. W. Smith, June 20, 1887, in-

formed C. A. Dolph that Loggie was to bid for the Oregon Southern Improvement Company for the bondholders' committee, and that the maximum bid was to be \$250,000, as Loggie had been instructed, also, that all but \$40,000 of the bonds had then been deposited with the bondholders' committee in making payment at the foreclosure proceedings. Other communications passed between C. A. Dolph, attorney of the Oregon Southern Improvement Company, in charge of the foreclosure proceedings, and officers of the company, containing instructions, suggestions and approved plan relative to the foreclosure proceedings (Deft. Ex. 214, 231, 232, R. pp. 539, 542).

By an agreement of February 10, 1887, between the bondholders of the Oregon Southern Improvement Company, plans were agreed upon for the "re-organization" of the Oregon Southern Improvement Company, by the organization of the Southern Oregon Company, to be effected by the foreclosure of the mortgage given to secure the bonds of the company (Deft. Ex. 225, R. p. 542).

P. W. Smith, May 24, 1887, outlined to Barnabas Holmes, a bondholder of the Oregon Southern Improvement Company, the plan for the foreclosure and "re-organization" of the company. The plan outlined showed the only liability of the company as over-due interest on the outstanding bonds (Deft. Ex. 215, R. p. 540), also, on November 5, 1887, Smith informed Charles W. Plummer, a large bondholder of the Oregon Southern Improvement Company, that "a new company has been organized to take the place of the O. S. I. Co.; it is called the Southern Oregon Co. \* \* \*" This letter

further states that the capital stock of the Southern Oregon Company was \$1,500,000.00, which would be distributed among the old bondholders (Deft. Ex. 214, R. p. 539).

W. W. Crapo, called by the defendant, testified that only a sufficient amount of stock was issued by the Southern Oregon Company to satisfy the bondholders of the Oregon Southern Improvement Company (Crapo, R. p. 260).

George W. Loggie testified that he was one of the incorporators of the Southern Oregon Company, and was manager of the company; James Webster was a book-keeper employed by the same company, and S. H. Hazard was attorney for that company; also, that he bid in the property of the Oregon Southern Improvement Company at the foreclosure sale, under the instructions and as a mere figure-head for Elijah Smith or Elijah Smith's attorney. The foreclosure was in charge of Senator Dolph. He was instructed to bid \$85,000 for the property for the Oregon Southern Improvement Company at the foreclosure sale and make a subsequent bid of \$125,000. One share of stock of the Southern Oregon Company was in his name, but in fact was owned by Elijah Smith or P. W. Smith; *after the organization of the Southern Oregon Company he managed the property as he had done for the Oregon Southern Improvement Company* (R. p. 383).

Since the bondholders and stockholders of the Oregon Southern Improvement Company were identical, there was no necessity for foreclosing the trust deed in order that the bondholders might get control of

the property. They had that already. What then, was the necessity of the foreclosure and re-organization unless they desired to cover something, and build, if possible, the defense of "innocent purchaser?"

#### REFUSAL TO GIVE WARRANTY DEEDS.

G. P. Miller testified that the settlers who were put off the land did not buy, because the Southern Oregon Company would not give Warranty Deeds (R. p. 392). No one denies this.

### XX.

#### Waiver, Laches and Estoppel.

The only evidence offered by the defendant for the purpose of showing notice to the government of breaches of conditions, other than the recording of deeds in Douglas and Coos counties, consists of statements in the pleadings in the suits commenced in 1896 and 1897, and heretofore referred to (*Supra*, p. 86).

There is no evidence showing that breaches were ever brought to the attention of Congress prior to the consideration of the bill authorizing the institution of this suit (*Supra*, p. 12).

### XXI.

#### Alleged Equities of Defendant.

The defendant claims that the government by the act of 1874, the issuance of patents in pursuance of it, and the failure to bring suits earlier for forfeiture, induced it to believe that the title was sound. Neither



the language of the act nor the detail in the patents warrant this claim. Failure of government to act—laches—never raises any right, equitable or otherwise, against it.

Is there anything else in the situation which would require, or justify, equity in relieving defendant from any of the obligations imposed by the law?

NO COMPETENT PROOF THAT ATTORNEYS PASSED THE TITLE  
AS GOOD.

W. W. Crapo, called by the defendant, testified that prior to investing in the Oregon Southern Improvement Company, he instructed Captain Besse to have the question of title carefully examined, and Besse subsequently reported to him that the title had been examined by a Portland lawyer and pronounced good (Crapo R. p. 251). He never saw the opinion of this lawyer and Besse gave him no details. He denied having any knowledge of the restrictive proviso until about 1903 or 1904. But Mr. Crapo's memory is not good. He denied that he was a stockholder of the Southern Oregon Company (Crapo R. p. 260), but the records show that he had 280 shares (R. p. 358), and was a director and presided at a directors' meeting (Govt. Ex. 83, R. p. 536). It is strange, too, that a "leading lawyer" (Rotch, R. p. 279) should have taken the word of a sea captain as to the title of an extensive piece of valuable property.

William Rotch, called by the defendant, formerly treasurer of the Oregon Southern Improvement Company, testified that prior to the purchase of the grant

lands the company obtained a report that the title was good, but he could not give the name of the person making the report; never had any conversation with a lawyer to the effect that the title was good, and never saw any opinion from a lawyer upon the subject. He did not examine the abstract himself (Rotch R. p. 277), and had no knowledge, he said, of the restrictive proviso until after the Kinney contract (1902) (Rotch R. p. 279).

Robert E. Shine, called by the defendant, testified that the Southern Oregon Company had abstracts of title of the granted land in their office which purported to trace the title from the government to the Southern Oregon Company. He expressed the opinion that none of the abstracts showed a defect in title with regard to the grant.

The abstract referred to is marked Defendant's Exhibit 207 (R. p. 539). It shows that the lands came from the government to Coos Bay Military Wagon Road Company, and through mesne conveyances to the Oregon Southern Improvement Company. The abstractor therefore, must have consulted the patents. If he did, he knew they were issued in pursuance of the two granting acts. There is nothing in the abstract to indicate he had considered at all the terms of the two granting acts.

George W. Loggie, formerly manager of the Oregon Improvement Company, called by the defendant, testified that he had obtained an abstract covering the grant land and that attached to this abstract was an opinion prepared by Attorney Hazzard. He could not state

specifically what the opinion set forth as to the title but knew the thoroughness with which Hazzard did his work, and believed the opinion covered the conditions of the grant from the United States. He could not recall the conclusion reached as to the title or whether he stated the conclusion (R. p. 383). The Hazzard abstract was prepared prior to the organization of the Southern Oregon Company.

Defendant's Exhibit 207 (R. p. 539) is an abstract of title prepared by Hazzard and Wilson, and covers all of the grant lands now held by the Southern Oregon Company.

Exhibit 208 (R. p. 539) is the opinion attached to the abstract (Deft. Ex. 207), but contains no mention of the restrictive proviso or its effect upon the title. No other opinion relating to the grant lands was offered in evidence.

Charles R. Smith, now president of the defendant company, had told him that he, Elijah, had the opinion of a Pittsburg attorney concerning the title, but Elijah did not produce it, and he (Charles R.) never saw it (Smith R. p. 409).

Marshall J. Kinney testified that he had procured from the Southern Oregon Company an option on the lands, for which he paid \$65,000 cash, and then attempted to sell them before completing the purchase. He entered into negotiations with several; finally a Mr. Wood of San Francisco expressed willingness to purchase, but upon examination of the title, found it was defective and refused to complete the deal.

Mr. Kinney says that prior to that time he had learned from Major Kinney that the title was defective by reason of the conditions in the grant. As the result, Mr. Kinney did not complete the purchase with the Southern Oregon Company and forfeited his payment of \$65,000 (R. p. 320).

These gentlemen, it seems, had no difficulty in ascertaining that the title was defective.

#### MR. MALLORY'S RELATION TO THE MATTER.

It is stipulated that C. A. Dolph, at the time of his correspondence concerning the foreclosure of the mortgage given to secure the bonds in the Oregon Southern Improvement Company heretofore referred to, was a member of the firm of Dolph, Bellinger, Mallory & Simon, and up to the time of his death in 1914 was a member of Dolph, Mallory, Simon & Gearin; that Dolph brought suit to foreclose the mortgage against the Southern Oregon Company, and during all of the time from the foreclosure proceedings was with his firm, attorneys for Elijah Smith and the Southern Oregon Company (R. p. 401).

It is also stipulated that Rufus Mallory came into the firm above mentioned in September, 1883, and continued, until his death, in the firm, and was the same Rufus Mallory who was a member of congress at the time the bill, which subsequently became the Act of March 3, 1869, granting the lands in question to the State of Oregon, was pending in Congress (R. p. 401).

The first deed to the Oregon Southern Improvement



Company was made January 5, 1884, several months after Mr. Mallory had become a member of the firm. He knew that congress had inserted the condition subsequent with full knowledge of the character of the land, and, therefore, with the intention that the conditions would apply, even though the land was chiefly non-cultivable (*Supra*, p. 85).

#### COST OF THE ROAD.

E. N. Harry, who had been road supervisor in Coos County for about 21 years, had been over the Coos Bay wagon road many times and was familiar with the road, estimated the average cost of construction of the road at \$500 a mile (R. p. 401).

W. H. Murray said he had worked upon the roads all his life, but it does not appear that he had ever been a contractor. He said he thought the road cost from \$500 to \$700 per mile (R. p. 391). Other witnesses testified as to the construction of various sections. There is nothing in their testimony which conflicts with that given by Harry and Murray.

#### ROAD OF LITTLE ADVANTAGE TO PUBLIC.

It is alleged in the answer that the transportation of troops and mails of the United States was greatly facilitated, especially as to distance, by the construction of the road (Siglin R. p. 388), (Weekly, R. p. 397), (Harlocker, R. p. 389), and in fact practically all of the witnesses who were called by either the complainant or defendant, testified that they had never seen or heard of United States troops passing over this road.

That prior to the construction of the road mail was brought into the Coos Bay country by pack horse. Subsequent to the construction of the road and during the winter season, pack horses had to be used in conveying the mail between Roseburg and Coos Bay as before.

#### TOLLS WERE COLLECTED BY WAGON ROAD.

For a long time the company collected toll, and a very good toll for the service rendered, so Buell (R. p. 400), Harry (R. p. 401), and Laird (R. p. 399) testified.

#### PURPORTED EXPENSES ON ACCOUNT OF THE LANDS.

C. G. Hockett testified to certain receipts and disbursements made in connection with the property of the Oregon Southern Improvement Company and the Southern Oregon Company. The following is his statement:

**Receipts.**

Sales of lands.....	\$ 24,500.00
Sales of timber lands and timber .....	77,621.47
Leases of lands.....	10,937.44
Chittam bark.....	11,223.01
<hr/>	
Total.....	\$124,281.92

**Disbursements.**

Land expense, cruising, fire protection, etc.....	\$ 17,229.61
Improvement on land made by lessees.....	1,399.05
Stumpage expenses, cost of delivering logs.....	4,475.35
Chittam bark, expenses of marketing .....	17,904.42
General expenses.....	218,207.83
General taxes.....	325,305.17
Special road taxes.....	5,787.47
School taxes.....	762.90
Legal expenses.....	6,077.15
Interest .....	218,829.49
<hr/>	
Total .....	\$815,978.44

Receipts ..... 124,281.92

Excess disbursements

over receipts.....\$691,696.52

Interest ..... 218,829.49

Excess disbursements

over receipts, other

than interest.....\$472,867.03

(R. p. 286,  
et seq.)

The largest items were "General Expenses" \$218,207.83; "General Taxes" \$325,305.17 and "Interest" \$218,829.49. The item of "General Expenses" Hockett testified, included "general supervision" and other miscellaneous expenses relating not only to the grant lands but to the other properties of the companies, it being impossible to segregate the expense chargeable to the grant land from that chargeable to the other property.

The item of "General Taxes" undoubtedly includes taxes paid on property other than the grant lands, as Hockett testified that in Douglas County, up to and including 1908, \$19,419.36 had been paid, while the itemized statement of such taxes shown by the records of Douglas County amounts to \$14,409.54, exclusive of the year 1892, which could not have amounted to over \$510.00. This would bring the total of the taxes paid to Douglas County up to \$14,919.54. An official statement of the taxes paid in Coos County is not in evidence, but Hockett testified that up to and including 1908, \$152,218.13 had been paid by the companies in that county, and that the taxes for 1909 were \$19,154.76, making a total of taxes paid and payable at the time of the institution of this suit \$186,292.43. No taxes in Douglas County have been paid since 1908 (R. p. 293).

The item of "Interest," Hockett testified, is based upon two notes, one dated April 1891 and the other October 1896. The reason for charging this item to the grant land is not explained. Hockett also testified to an item of \$17,000 for "Land Expenses" which included cruising, fire protection, etc., of the lands of the companies (R. p. 294).



It is impossible to conceive how the items mentioned by Hockett could be chargeable to the grant land, which the undisputed testimony shows were practically all in a state of nature and required no attention from the company other than fire protection and examination such as is covered in the item of "Land Expenses" and the payment of taxes. However, practically all of the expenses incurred in the protection and maintenance of these lands were for the purpose of holding the lands for speculation in violation of the intention of the granting act.

As illustrative of the unreliable character of the Hockett statement of receipts and disbursements, it is shown by the testimony of M. J. Kinney (R. p. 400) that he and his associate paid to the Southern Oregon Company, \$65,000, in connection with the grant lands, but this item is not credited in the Hockett statement.

#### VALUE OF THE LANDS.

The bill alleges the value of the lands to be four million dollars. The answer denies this and asserts that they are not worth to exceed one million dollars.

The cruises of the lands show that they contain 2,359,081,000 feet of lumber. This, at an average of one dollar a thousand, would amount to \$2,359,081 and does not take into account the value of the land after it had been denuded (*Supra*, 83).

The witness Thrift said that since 1900 the land had become quite valuable for timber (R. p. 229).

Defendant's Exhibit 177 (R. p. 537) shows a classification of the lands into tillable and non-tillable, for the purposes of taxation. County Assessor Thrift says that the classification is not correct; that some of the land classified as non-tillable is tillable (R. p. 229). He also says that the State Tax Board considers the assessed valuation in Coos County as 69 per cent of the actual value (R. p. 230).

The witness Murray said that the present value of bottom lands was from \$100 to \$200 per acre (R. p. 391).

**POLICY OF DEFENDANT AND ITS PREDECESSORS IN TITLE IN REFUSING TO SELL HAS BEEN INJURIOUS TO THE COMMUNITY IN WHICH THE LAND IS LOCATED.**

Many witnesses testified to the paralyzing effect upon the development of Southwestern Oregon of the policy pursued by the Wagon Road Company and its successors in title.

A. T. Siglin, formerly County Treasurer and Sheriff of Coos County, testified that the failure to sell grant lands had retarded the development of the country, thus holding large tracts idle. A large portion of the lands could readily have been disposed of, he thought, if the companies had been willing to sell (R. p. 388).

Isaac Taylor Weekly testified that if the company had sold the lands in quantities of 160 acres at \$2.50 an acre as required by the grant, the population over the area of the grant would have been greater, and that the failure to comply with the conditions had retarded the settlement of the country. He referred to

the failure to sell bottom and bench lands (R. p. 398).

Earl Harlocker testified that if the Coos Bay Wagon Road Company had sold the land there would have been more settlers along the road (R. p. 390).

Albert E. Bettis, witness for the defense, testified that the refusal of the Coos Bay Wagon Road Company to sell had prevented settlement in the neighborhood in which he resided (R. p. 237).

George W. Loggie, who for five years had been manager, first of the Oregon Southern Improvement Company, and then of the Southern Oregon Company, and was, in addition, a director and vice-president of the Southern Oregon Company, testified that the policy of the two companies in refusing to make sales within the terms of the restrictive proviso retarded the development of the country, as their property covered a large part of the country, and that on general principles adherence of that kind of policy would retard the growth of any place (R. p. 384).

That these witnesses are correct must be apparent.

Respectfully submitted,

CONSTANTINE J. SMYTH,  
*Special Assistant to the Attorney General.*

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IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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**SOUTHERN OREGON COMPANY**  
DEFENDANT AND APPELLANT

VS.

**UNITED STATES OF AMERICA**  
COMPLAINANT AND APPELLEE

---

**Appellant's Brief on the Law**

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**DOLPH, MALLORY, SIMON & GEARIN**  
Solicitors for Appellant

**CONSTANTINE J. SMYTH**  
Special Assistant to the  
Attorney-General  
Solicitor for Appellee

**Filed**

APR 24 1918

**E. D. Monckton,**  
Clerk.





# Index

	Page
1. Statement of the Issues.....	1-10
2. Judge Wolverton's Opinion .....	11-13
3. Oregon and California Case Compared...	13
4. Appellants' position stated .....	14-17
5. Condition subsequent not favored; if there is doubt whether words create covenant or condition, courts will hold that they create a covenant and <i>not</i> a condition.....	17-30
6. The proviso under discussion must be con- strued with reference to the other clauses and provisos in the Act and the para- mount purpose of the Act.....	10-14
7. A proviso or condition repugnant to the grant is void and this proviso comes under that head .....	30-36
8. At the time of the grant and for five years thereafter ninety per cent of the total acre- age of the grant could not be sold in 160- acre tracts at any figure.....	37-38
9. Percentage of agricultural lands in the grant shown .....	38-39
10. The desirable land in the valleys within the limits of the grant were all taken up prior to the grant .....	40
11. The Government could not dispose of the even sections within the limits of the grant, as shown by the records of the Roseburg Land Office, a summary of which by town- ship and range is found on page.....	41

# INDEX—Continued

	Page
12. The State of Oregon could not sell its school lands within the same boundary, as shown by summary by township and range on pages .....	42-45
13. Defendant is a <i>bona fide</i> purchaser, and as such its title will be protected.....	45-51
14. The Government is estopped in this suit by records of four prior suits brought by the Government, as shown by Exhibits 240, 241, 242 and 243 .....	51-70
15. Government had a right to bring suit when it brought those shown by Exhibits 240, 241, 242 and 243, and Act of April 30, 1908, was not necessary to enable it to do so.....	70-82
16. A court of equity is not controlled by technical rules of forfeiture, but will do substantial justice without reference to those rules .....	82-87
17. This being a grant to the state, the road having been constructed and the grant earned, the complete title passed to the state as of the date of the Granting Act, and the Government cannot follow the land or enforce a condition. Congress had exhausted its power over these lands and the sovereignty of the state attached.....	87-96
18. Answer to certain general statements in the bill .....	96-109
19. Table of cases.....	110

**IN THE**  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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SOUTHERN OREGON COMPANY,  
*Defendant and Appellant.*

*vs.*

UNITED STATES OF AMERICA,  
*Plaintiff and Appellee,*

---

**Appellant's Brief on the Law**

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**STATEMENT OF CASE**

This is a suit in equity to declare a forfeiture. Without challenging the jurisdiction of the Court as a court of equity to entertain a suit to declare a forfeiture, we proceed directly to the consideration of the relief demanded and the reasons given for making the demand.

**THE ISSUE.**

**I.**

It is alleged in the Bill of Complaint and is admitted by defendant that: One March 3rd, 1869, Congress passed the following Act:

“An Act granting Lands to the State of Oregon to Aid in the Construction of a Military Wagon Road from the Navigable Waters of Coos Bay to



Roseburg in said State," which said Act was approved by the President of the United States upon said 3rd day of March, A. D. 1869, and is in terms as follows :

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road: *Provided*, That the lands hereby granted shall be exclusively applied to the construction of said road and to no other purpose, and shall be disposed of only as the work progresses: *Provided further*, That the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one-quarter section, and for a price not exceeding two dollars and fifty cents per acre: *And provided further*, That any and all lands heretofore reserved to the United States, or otherwise appropriated by act of Congress or other competent authority, be, and the same are hereby, reserved from the operation of this Act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way to the width of one hundred feet is granted: *And provided further*, That the grant hereby made shall not embrace any mineral lands of the United States, or any lands

to which homestead or pre-emption rights have attached.

“Sec. 2. And be it further enacted, That the lands hereby granted to said State shall be disposed of by the Legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the Government of the United States, free from tolls or other charges upon the transportation of any property, troops, or mails of the United States.

“Sec. 3. And be it further enacted, That said road shall be constructed with such width, graduation, and bridge as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

“Sec. 4. And be it further enacted, That the State of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands, not previously reserved to the United States nor otherwise disposed of, and not exceeding six miles in distance from it, equal to the amount reserved from the operation of this Act in the first section of the same, to be selected in alternate odd sections, as provided in section first of this Act.

“Sec. 5. And be it further enacted, That lands hereby granted to said State shall be disposed of only in the following manner, that is to say, when the Governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed then a quantity of the land

hereby granted, not to exceed thirty sections, may be sold, and so on from time to time, until said road shall be completed; and if said road is not completed within five years no further sale shall be made, and the lands remaining unsold shall revert to the United States: *Provided, however,* That the entire amount of public land granted by this act shall not exceed three sections per mile for each mile actually constructed.

“Sec. 6. And be it further enacted, That the United States Surveyor General for the District of Oregon shall cause said lands, so granted, to be surveyed at the earliest practicable period after said State shall have enacted the necessary legislation to carry this Act into effect.”

## II.

On June 18th, 1874, Congress passed the following Act:

“An Act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases,” which said Act was approved by the President of the United States upon said 18th day of June, A. D. 1874, and is in terms as follows:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the Governor of the State of Oregon, as in said Act provided, to have been constructed and completed, pat-

ents for said lands shall issue in due form to the State of Oregon, as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: *Provided*, That this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled."

### III.

On October 22nd, 1870, the Legislative Assembly of the State of Oregon passed the following Act:

"An Act donating certain lands to the Coos Bay Wagon Road Company," which said Act was approved by the Governor of the State of Oregon upon said 22nd day of October, A. D. 1870, and is in terms as follows:

*"Be it enacted by the Legislative Assembly of the State of Oregon,*

"Section 1. That there is hereby granted to the Coos Bay Wagon Road Company all lands, rights of way, privileges, and immunities heretofore granted or pledged to this State by the Act of Congress, in this Act heretofore recited for the purpose of aiding said company in constructing the road mentioned and described in said Act of Congress,



upon the conditions and limitations therein prescribed.

“Section 2. There is also hereby granted and pledged to said company all moneys, lands, rights, privileges and immunities which may be hereafter granted to this State to aid in the construction of such road for the purposes, and upon the conditions and limitations mentioned in said Act of Congress, or which may be mentioned in any further grants of money or lands to aid in constructing such road.

“Section 3. Inasmuch as there is no law upon this subject at the present time this Act shall be in force from and after its passage.”

#### IV.

That on April 30th, 1908, Congress passed the following Joint Resolution:

“That the Attorney General of the United States be, and he hereby is, authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any and all rights and remedies of the United States of America in any manner arising or growing out of or pertaining to either or any of the following described Acts of Congress, to-wit: \* \* \* \*; also ‘An Act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, in said State,’ approved March third, eighteen hundred and sixty-nine; \* \* \* , including all rights

and remedies in any manner relating to the lands, or any part thereof, granted by either or any of said Acts; and in and by any and all such suits, actions, or proceedings the Attorney General shall, in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States relating to the subject of such suits, actions and proceedings, including the claim on behalf of the United States that the lands granted by each of said Acts respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said Acts which may be alleged and established in any such suits, actions, or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being intended to fully authorize the Attorney General in and by such suits, actions, or proceedings to assert on behalf of the United States and the court or courts before which such suits, actions, or proceedings may be instituted or pending, to entertain, consider, and adjudicate the claim and right of the United States to such forfeiture or forfeitures, and if found to enforce the same: *Resolved further*, that the authority and direction hereinbefore given shall extend to any and all suits, actions, or proceedings which may be instituted or pending under the authority of the Attorney General at the time of the adoption and approval hereof."

## V.

That the Coos Bay Wagon Road Company built the road provided for by said Act of Congress of March 3rd, 1869, and completed the same prior to October 21, 1872. That the Governor of the State of Oregon on December 10th, 1870, September 19th, 1872, and October 4th, 1872, duly certified to the Secretary of the Interior the completion of the road by sections, and that following said certificate of the Governor patents were issued and delivered to the Coos Bay Wagon Road Company as follows:

Patent No. 1, dated February 12, 1875, embracing 42,496.93 acres;

Patent No. 2, dated March 18, 1876, embracing 1,080.00 acres;

Patent No. 3, dated November 8, 1876, embracing 61,111.53 acres;

Patent No. 4, dated February 17, 1877, embracing 431.65 acres.

The lands patented as aforesaid aggregate 105,120.11 acres.

## VI.

That the Coos Bay Wagon Road Company prior to May 31st, 1875, sold 6,963 acres of the land embraced in the grant to approximately 53 purchasers, but no complaint is made about these sales and the recital in the bill is merely a part of the history of the grant.

## VII.

That on May 31st, 1875, the Coos Bay Wagon

Road Company sold all the granted lands (except said 6,963 acres), and being about 96,676.96 acres, to John Miller.

### VIII.

That by *mesne* conveyances (alleged in the Bill to be in "evasion of the law," "in violation of the terms of the grant," etc.) from said John Miller, the defendant Southern Oregon Company succeeded to the title of record of the Coos Bay Wagon Road Company.

### IX.

The complaint is found in the printed Abstract from pages 2 to 139. The various transactions, transfers and conveyances with reference to these lands from May 31st, 1875, down to the time of filing the Bill in this suit are set out on pages 10 to 32 of said record. Eliminating much extravagant and irresponsible averment from the narrative, the chain is sufficiently accurate for a proper understanding of the Government's claim and its weakness.

The theory of the Government's case at the time of the filing of the complaint and trial in the lower court, was that the grant made by the Act of March 3rd, 1869, was a grant *upon condition subsequent*; that there had been a breach of condition, and the Government asked for a forfeiture because of the breach.

It was on this theory that the case was argued before Judge Wolverton January 28th, 1915. On



June 21st, 1915, the Supreme Court decided the case of the United States vs. O. & C. R. R. Company, et al., where a similar provision in a grant was held *not* to constitute a condition but *was* a covenant merely (35 Sup. Ct. Rep. 908). On July 12th, 1915, Judge Wolverton decided the present case in favor of the Government and against the defendant. It is true that in no part of his opinion does he hold that the proviso is *not* a condition but he does quote and adopt the following portion of the opinion of the Supreme Court in the O. & C. case: "Our conclusions then on the contentions of the Government and the Railroad Company are that the provisos are not conditions subsequent; that they are covenants and enforceable."

Judge Wolverton follows this excerpt with the statement: "What is there said is applicable here and amply disposes of the contentions advanced without further reasoning or comment." (Page 201, Abstract of Record.)

Following this opinion, the Court entered its final decree December 7th, 1915, as follows:

*In the District Court of the United States for the  
District of Oregon.*

No. 3701.

United States of America, Complainant,

vs.

Southern Oregon Company, Defendant.

This cause having come on to be heard upon the pleadings and the evidence, was argued and sub-

mitted by counsel for the respective parties, and the Court being now fully advised in the premises, orders, adjudges and decrees as follows :

1. That the defendant and its officers and agents be and each is hereby enjoined from selling the lands or any part thereof, or any of the timber thereon, granted by the Act of Congress, approved March 3, 1869, and described in Exhibit H attached to the Bill of Complaint in this case, in quantities greater than one-quarter section to one person, or for a price exceeding \$2.50 per acre; and from selling any of the timber on said lands, or any mineral or other deposits therein, except as part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found, and from cutting or removing, or authorizing the cutting or removal of any of the timber thereon, or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits.

2. That the defendant and its officers and agents be, and each is, hereby enjoined, from making or agreeing to make, either directly or indirectly, any disposition whatsoever of said lands or of any part thereof or of the timber thereon, or any part thereof; or of any mineral or other deposits therein; from cutting, removing or authorizing the cutting or removal of the timber thereon or any part thereof; and from removing or authorizing the removal of mineral or other deposits therein, until Congress

shall have a reasonable opportunity to make provision by legislation for the disposition of said lands, timber, mineral or other deposits, in accordance with such policy as Congress may deem fitting under the circumstances and at the same time secure to the defendant all the value that the granting act conferred upon the State of Oregon, or the Wagon Road Company.

3. That if Congress does not make provision for the disposition as aforesaid of said lands, timber, mineral or other deposits the defendant may apply to the court within a reasonable time, but not less than eight months from the entry of this decree, for a modification of so much of the injunction herein ordered as forbids any disposition of said lands or money, timber, mineral or deposits, or any part thereof, until Congress shall act, and the court hereby reserves the right to modify this decree in that regard, if, in its opinion, good cause shall then exist for doing so.

4. That the complainant have and recover from the defendant, Southern Oregon Company, its lawful costs and disbursements herein, taxed at \$1,095.54, and that execution issue therefor.

5. That the complainant shall have the right to apply to the court at any time hereafter for an accounting as to all moneys received by the defendant from or on account of the lands covered by said granting act, and the court retains jurisdiction over the action for the purpose of granting such application if good cause therefor appears.

## THE OREGON & CALIFORNIA RAILROAD COMPANY CASE

The case at bar differs in several respects from the Oregon & California Railroad Company case.

First. In the O. & C. case, the grant was to a corporation not in existence but to come into existence. In the present case the grant is to the State.

Second. In the O. & C. case, because of this fact and the further fact that the proviso alleged to be a *condition* was not in the original grant of July 25, 1866, but in a joint resolution of April 10, 1869, there was a question as to when the grant took effect. Here there is no question. The grant involved in this suit under all the authorities was *in præsenti*, and upon the completion of the road took effect as of date of the grant, March 3, 1869.

Third. In the O. & C. case the title remained in the original grantee in the patent—the railroad company. In the present suit title is in Southern Oregon Company, the fourth transferee from the original patentee.

The whole controversy here revolves around the Second Proviso in the Granting Act of 1869,—“*Provided further*, that the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person in quantities not greater than one-quarter section and for a price not exceeding \$2.50 per acre.”



The Government claimed in its Bill and at the trial in the lower court that this proviso created a *condition subsequent* and a failure to observe its terms entitled the grantor to demand a forfeiture of the grant. What its claim will be here we are not advised.

## DEFENDANT INSISTS:

### I.

Section 5 and the first and second proviso of Section 1 of the Act must be read together; and, when so read, it is apparent that the second proviso above quoted referred only to sales made during the first five years, as the Act has provided in Sections 1 and 5, and was not intended to apply to sales made *after* the road was completed and accepted.

### II.

Even conceding that this proviso was intended to apply to all sales whenever made, it is a matter of contract, a covenant only, the observance or non-observance of which depends on the good faith of the State, and that it is not and cannot be considered a "*condition subsequent*," nor is it an enforceable covenant against the Southern Oregon Company.

### III.

Defendant, Southern Oregon Company, is a *bona fide* purchaser of the lands, title to which the Government now seeks to forfeit.

## IV.

The Government is estopped to now urge the forfeiture of this title for breach of condition or failure to observe the covenant, because of the four suits heretofore brought by the Government against these defendants and other defendants. (Exhibits 240, 241, 242 and 243.)

## V.

This being a grant to the State and the State having earned the lands by complete construction of the road, the Government cannot follow the lands and direct the disposition of them by the State.

## VI.

The proviso in the first section of the Act, whether construed as a condition or covenant, is obnoxious to the grant—the grant will be upheld and the restrictions of the proviso will fall.

The Decree entered in the court below was patterned after the final decree in the O. & C. case. While the proviso in the Joint Resolution of April 10, 1869, over which the controversy arose in the O. & C. case, is similar to the proviso in the Coos Bay Wagon Road Grant, yet the two are not identical. Set opposite each other the difference between them is apparent:

## O. &amp; C. GRANT

“And provided further, that the lands granted by the Act aforesaid shall be sold *to actual settlers only* in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding \$2.50 per acre.”

COOS BAY WAGON ROAD  
GRANT

“Provided, further, that the grant of lands hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one-quarter section, and for a price not exceeding \$2.50 an acre.”

In the opinion of the Supreme Court in the O. & C. case importance is attached to the limitation of sale to “actual settlers only,” and the theory is worked out that because of these words the settlement of the country and not the building of the road was the paramount purpose of the grant, and that this restriction evidenced a policy “more dominant in purpose than the building of the road.”

No such claim can be made here. Actual settlement on these lands was neither provided for nor contemplated. As a matter of fact, with the exception of about one-tenth of the grant, settlement was, and is, impossible. No controversy over the meaning of the term “actual settlers” arises here. The question of governmental policy looking to encouraging settlers to go upon the land and settle up the country to which so much importance was attached in the O. & C. case, has no application here in mea-

sureing the restraint upon alienation contained in the proviso in the Coos Bay Grant.

## ARGUMENT

In view of this record and the decision of the Supreme Court of the United States in the case of the United States vs. O. & C. Railroad Company, (35 S. C. R. 908-925), it would seem to be unnecessary to discuss herein the question of "condition" or "covenant" as applied to the Act of March 3, 1869. While there are material differences, as stated above, between the two cases, yet the proviso in the Act of April 10, 1869 (the O. & C. case) is similar to the proviso here under examination.

If the proviso in the O. & C. case did not create a condition subsequent, clearly the proviso here does not, so that this suit originally begun to claim a forfeiture of the entire title for *breach of condition* has been changed entirely and is now in effect a suit to enforce a *negative covenant* by injunction. In determining whether a clause in a grant is to be construed as a condition or a covenant, there are some definite principles which are so generally recognized by the courts that we may consider them settled law. Among them are:

### I.

When the language of a grant raises a doubt as to whether the provision is intended as a condition



or a covenant, the court will resolve the doubt in favor of the grantee and will hold it to be a covenant.

## II.

While the words "upon condition," etc., are apt words to create a condition subsequent and may evidence one, yet they do not always, or necessarily do so. The same words may be employed to express a covenant or create a condition; and if there is any doubt regarding the intention of the grantor or devisor, courts will incline towards the former construction—for conditions which tend to destroy estates are not favored and are strictly construed. In *U. S. vs. O. & C. R. R. Co.*, 186 Fed. 899, Judge Wolverson said:

"Some general observations concerning conditions subsequent may be made in passing. They are not favored in law, and ordinarily are amenable to strict construction, for the reason that, if not observed according to their tenor, they entail forfeiture and a destruction of the estate. A mere declaration touching the particular purposes for which the grant is made, or that the grantee is to do or not to do certain things, will not evidence a condition. And, generally speaking, a condition in a grant should be created by apt and appropriate words—words which *ex proprio vigore* import a condition. Furthermore, if there be doubt as to whether the words create a condition subsequent, or a covenant, the breach of which may be compensated in dam-

ages, courts will construe them favorably to the latter.

“Instances are not wanting, however, where words and terms appropriate to create a condition when read in connection with the context of the grant and the intention of the parties, have been disregarded in their technical sense, and construed as in harmony with a covenant, and conversely, the decision depending upon the real purpose and intent of the parties to the grant, as gathered from the manner and purpose of the conveyance and from the instrument itself, read in its entirety. And it has been held that, although a deed or conveyance contain a clause declaring the purpose for which it is intended the granted premises shall be used, if such purpose will not inure specially to the benefit of the grantor, but is in its nature general and public, and if there are no words in the grant indicating an intent that the grant is to be void if the declared purpose is not fulfilled, such a clause is not a condition subsequent.” Vol. 6 Am. and Eng. Cycl. Law, page 502; 4 Kent’s Commentaries (13 Ed.), page 132.

In *United States vs. New York Indians*, 170 U. S., page 25 (18 Supreme Court Reporter, page 537), the Supreme Court said:

“A condition when relied upon to work a forfeiture, is construed with great strictness. The grantor must stand on his legal rights, and any ambiguity in his deed, or defect in the evidence

offered to show a breach, will be taken most strongly against him, and in favor of the grantee. A condition will not be extended beyond its express terms by construction. The grantor must bring himself, within these terms, to entitle him to a forfeiture. (Jones, Real Prop., Sections 678, 679.)”

It was claimed by counsel for the Government in the lower court and will be here, that “in construing government grants such as the one under consideration, all doubts must be resolved in favor of the grantor.” Within the scope of its proper application this doctrine may be admitted. The grant, truly, is to be construed against the grantee, but in defining the sweep of the inhibition contained in a restrictive proviso the rule is the reverse. In *Kiefer vs. German American Seminary*, 46 Mich., page 639, Judge Cooley clearly states the doctrine and defines its limitations thus: “The general rule undoubtedly is, that public grants are to be construed strictly as against the grantees. *United States vs. Arredondo*, 6 Pet. 691; *Charles River Bridge vs. Warren Bridge*, 11 Pet. 544; *Martin vs. Waddell*, 16 Pet. 367; *Dubuque, etc., R. R. Co. vs. Litchfield*, 23 How. 66; *Baltimore vs. Railroad Co.*, 21 Md. 50; *Bradley vs. Railroad Co.*, 21 Conn. 294; *Richmond vs. Railroad Co.*, 21 Grat. 614; *DeLancey vs. Ins. Co.*, 52 N. H. 581; *La Plaisance Bay Harbor Co. vs. Monroe*, Walk. Ch. 155; *Pennsylvania R. R. Co. vs. Canal Com’rs*, 21 Penn. St. 22. The grantee shall take nothing which is not plainly granted, and as is said in the

case last cited, 'every resolution which springs from doubt is against' him. But there is no question in this case in respect to the grant; its terms are clear and precise and its extent undisputed; the controversy arises upon the terms of a restraint imposed by the grant, and which is in the nature of a condition subsequent, and tends to a defeat of the grant by way of forfeiture. *If the grant is to be construed strictly as against the grantees, the condition is to be construed strictly against the state;* and the state is entitled to enforce it only when a forfeiture would be fairly within the intent of the act whereby the grant was made. The purpose of construction is to give effect to an instrument; not to defeat it. *Rice vs. Railroad Co.*, 1 Black 358; *People vs. Burns*, 5 Mich. 114; *Tabor vs. Cook*, 15 Mich. 322; and in a public grant especially, more than in any other, we should expect to find provisions looking to the permanent enjoyment of the right or property granted as against mere technical breaches of contract or condition on the part of the grantee, not tending to defeat the general purpose."

In *United States vs. Denver & Rio Grande R. R. Co.*, 150 U. S. 14, this Court said:

"It is undoubtedly, as urged by the plaintiffs in error, the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair impli-



cation. In *Winona & St. Peter Railroad vs. Barney*, 113 U. S. 618, 625, Mr. Justice Field, speaking for the court, thus states the rule upon this subject: 'The acts making the grants \* \* \* are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together.'

"Looking to the condition of the country, and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the Act of 1875. When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted. *Bradley vs. New York & New Haven Railroad*, 21 Connecticut, 294; *Pierce on Railroad*, 491."

Morrill vs. Wabash St. L. & P. Ry. Co., 96 Mo. 174, 179.

Roanoke Investment Company vs. K. C. S. E. Ry. Co. 108 Mo. 50, 63.

Farnham vs. Thompson, 34 Minn. 330, 337.

Emerson vs. Simpson, 43 N. H. 475, 477.

Page vs. Palmer, 48 N. H. 385, 387.

Wier *et al.* vs. Simmons, 55 Wis. 637, 643.

In any examination to determine the true meaning of this proviso, it must be remembered, therefore, that the whole Act must be compared—its other provisions and its object. The paramount object of this legislation was the building of a “*Military wagon road from the navigable waters of Coos Bay to Roseburg.*” No other object was mentioned—none was contemplated. The first proviso, “That the lands hereby granted shall be exclusively applied to the construction of the said road and shall be disposed of *only as the work progresses*” is as much a “condition” as the other. Whether it is a covenant or condition, however, or by whatever term we designate it, it shows quite clearly what Congress intended. *The road should be built.* The lands should be sold to accomplish *that* purpose and no other purpose. And when that purpose was accomplished the Government had no further interest in the lands nor in the disposal of them. It is a clear case of contract with the State. This is still more apparent from the fifth clause:

“And be it further enacted, that lands hereby

granted to said State shall be disposed of only in the following manner, that is to say, when the Governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed thirty sections, may be sold; and so on from time to time, until said road shall be completed; and if said road is not completed within five years *no further sale shall be made, and the lands remaining unsold* shall revert to the United States."

The "lands remaining unsold shall revert to the United States"—*for non-completion of the road only*. Congress knew how to phrase a condition subsequent and to provide a penalty for breach. It would have been just as easy to put these words of reversion into the first section as into the fifth—and they would have appeared there if Congress had any idea of providing for the forfeiture demanded in this suit. And because they *do not* appear there the conclusion follows that they were *purposely omitted*.

There is in Section 5 a limitation on the *time* within which the road shall be completed. It is to be noted that while this section provides for the forfeiture of the *unsold lands*, that is, lands which the State has not sold in case the road is not completed in five years, there is no provision for the forfeiture of any lands *sold by the State up to that time*—whether the road is completed or not. It is

apparent that Congress intended to *confirm* all titles *where the State had sold* within five years, and this without reference to the completion of the road. Where, however, the State *had not sold*, the lands reverted to the United States. To illustrate: This road is sixty-three miles long. Suppose at the end of five years the State had completed fifty miles of it and such completion was certified by the Governor to the Secretary of the Interior—five sections, of ten miles each—and no more. Upon filing the Governor's certificates with the Secretary of the Interior, the State would receive title to 150 sections. The State sold, say, 75 of these sections before the five-year limitation expired, leaving 75 sections unsold and the road uncompleted. By the terms of Section 5 the title to the 75 sections *unsold* reverted to the United States, but there is no reversion of title as to the 75 sections *sold by the State*. The maxim *expressio unius*, etc., applies, and the *sold* lands would not be forfeited if the road never was completed. Indeed a fair reading of this whole Act *compels* the conclusion that all regulations and limitations had reference only to "sales" made during the time of the construction of the road. The "sales" *regulated* by the second proviso are the "sales" *referred to* in the first proviso.

The Government is in court here asking for a *strict* construction and demanding the extraordinary and drastic remedy of forfeiture. But a court of equity, if it entertains jurisdiction at all, will



be governed in granting relief by equitable principles and practices—and the Government's demand is inequitable. The Act does not pretend to regulate sales of this property *after completion of the road*. Both the provisos are limited to lands "*disposed of only as the work progresses*" and "*exclusively applied to the construction of said road and to no other purpose.*" Does it need argument to show that lands cannot be "applied" to the "construction" of a road already constructed, or be "disposed of only as the work progresses"—after the work has been completed? These provisos in Section 1 are neither conditions nor covenants "running with the land," and counsel for the Government will not claim that they are. We quote the following statement of the law from the Government's brief in the Oregon & California Railroad Company's case in the District Court, on the argument of the demurrer:

"It may be suggested that Congress intended to make this provision a covenant running with the land. But a moment's consideration will demonstrate the fallacy of this. A covenant running with the land would be a permanent restriction upon the manner in which the lands might be sold or owned. The lands could never be sold except to actual settlers, in quantities not exceeding 160 acres, and for a price not exceeding \$2.50 per acre. Congress did not intend to place a permanent restriction of that kind upon the industrial life of the community in which these lands are situated. It intended effect-

ively to regulate the primary disposition of the lands by the railroad company, but that was all. It intended to initiate healthful commercial and industrial conditions, but it did not presume to control the internal affairs of the State of Oregon for all time to come. Its authority to do so may well be questioned. It has never attempted to do so elsewhere, and to assume that it attempted to in this instance is opposed to the traditions of our national life and to every reasonable intendment of national legislation.

“If, as contended by the Government, Congress intended to restrain only alienation by the railroad company, a covenant running with the land was inappropriate.”

And yet the Government asks the Court to decree that as to the Southern Oregon Company, the sixth in order of the holders of this title, the *second* proviso quoted above regulating sales *which could be made* is operative to regulate the terms and conditions of sales which the *first* proviso says *shall not be made at all*.

While it is true that in certain cases where a covenant is not one that “runs with the land,” equity will take jurisdiction to enforce the covenant, yet these are all cases where the covenant relates in some way to the *use* of the land or subjects the land to certain *easements* or *servitudes*. In no case that we have found in the reports has it been held that a covenant such as this, which affects only the

*manner* of alienation, could be enforced against a holder of the title after it had passed out of the original grantee.

Covenants in order to run with the land must, however, relate to the interest or estate so that their performance or non-performance will affect the quality, value or mode of enjoyment of the estate.

8 A. & E. Ency. Law, 139.

All covenants are either real or personal. Those so clearly connected with the realty that their benefit or burden passes with the realty are construed to be covenants real; all others are personal.

11 Cyc. 1052.

Spencer's Case, 5 Coke, 16 (1 Smith's L. Cas. 68), is the leading case on the subject. In that case it was said: "Yet if the thing to be done be mere collateral to the land and doth not touch or concern the thing described in any sort" the assignee of the covenantor shall not be bound.

This suit is to declare a forfeiture—no other relief is asked for in the complaint. The Government claims that the proviso in Section I of the Act creates a condition subsequent—that there has been a breach, hence the complainant is entitled to take back the land.

The lower court holds that the proviso does not create a condition and therefore there is no forfeiture. The whole prayer of complainant's bill is de-

nied. A decree is entered, however, restraining the defendant from doing anything with the lands "until Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances and at the same time secure to the defendant all the value that the granting Act conferred upon the State and the Road Company. In case Congress makes no such provision within eight months defendant may apply to the court for such modification of the injunction as may seem appropriate."

The defendant has always claimed that this proviso in the Act was a covenant and that as against it, it was *not* enforceable, for many reasons set out in the answer. The court agrees that it is a covenant, but says that it *is* enforceable. If it is enforceable, the lower court should have enforced it. Suppose Congress does not act in the eight months provided in the decree, what then? We "may apply to the court for such modification of the injunction as may seem appropriate." The court will have no more authority then than it had when it made the decree. If it could do nothing towards enforcing this covenant when it made the decree, it cannot do anything at the end of eight months. If it can do it at the end of eight months, it could have done it at the time of the decree, and should have done so. We had always supposed, up to the time of the rendition of the decree in the O. & C. case, that an "enforceable covenant" meant one that was capable of enforcement



at the time it was made, or, at all events, at the time when suit was brought upon it, and that the question of whether it was enforceable or not was to be determined by the law in force at the time the question is presented to the court. But if it is proper to enjoin proceedings in a case until Congress or a State Legislature may pass a law to make an "enforceable covenant" capable of being enforced, we were evidently in error.

### THE PROVISIO IS REPUGNANT TO THE GRANT AND THEREFORE VOID

This proviso is a limitation on the right of alienation and is repugnant to the grant, and therefore, whether it be considered a covenant or an attempt to create a condition, is void. The testimony was that 90 per cent of the total area of the grant could not, at the date of the grant, nor for five years thereafter, have been sold in tracts of 160 acres or less *at any price*. This pretended condition was therefore repugnant to the grant and cannot be sustained.

An examination of the adjudged cases shows:

#### A.

That the courts uniformly hold that any condition obnoxious to the grant is void—the grant will be sustained and the attempted condition eliminated.

#### B.

Any provision attached to the grant of the fee

simple title whereby the right of alienation is suspended for *any* length of time is a provision obnoxious to the grant and is void—the complete title will pass free from the attempted limitation.

De Peyster vs. Michael, 6 N. Y. 467-492-293.

Mandlebaum vs. McDonnel, 29 Mich. 77-97.

Anderson vs. Carey, 36 Ohio State 506-575.

Case vs. Dwire, 15 N. W. 265-266.

Bennet vs. Chapin, Vol. 7, L. R. A. 377-381.

Lathiner vs. Waddell, 3 L. R. A., pages 668-678 (26 S. E. 122).

Potter vs. Couch, 141 N. S. 315.

Scovill vs. McMahan, 21 L. R. A. 58.

Vandershie vs. Hanks, 3 Cal. 28-41.

Burnham vs. Burnham, 79 Wis. 557.

In Case vs. Dwire, an Iowa case reported in 15 Northwestern Reporter, page 265, 60 Iowa 44, the court said:

“Here, then, is an absolute conveyance in fee simple with a condition inconsistent therewith. The deed and condition are in conflict. Which shall stand? The deed vested the fee-simple title absolute in the grantee. Any condition inconsistent therewith would, if enforced, defeat the deed. But the law will uphold the conveyance. The condition must, therefore, be inoperative. As the fee-simple title absolute is conveyed by the deed, the condition cannot be enforced, for it is inconsistent therewith.”

In Anderson against Cary, 36 Ohio State Re-

ports, page 515, the court had for decision the scope of a certain devise in a will, to wit:

“Upon the following conditions: I direct that they, the said sons, shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son, Charles Lincoln, arrives at full age, except to one another, nor shall either of my said sons have authority to mortgage or encumber said farm in any manner whatsoever, *except in the sale to one another as aforesaid.*”

In construing this clause the court said:

“Instead of giving to his sons an estate in the land less than a fee simple, his intent and purpose was to give them the fee simple, but to eliminate therefrom its inherent element of alienability, for a limited period, or to incapacitate his devisees, although *sui juris*, from disposing of their property for the same limited period, to wit: until the younger should arrive at thirty-one years of age—each and both of which purposes are repugnant to the nature of the estate devised.

“By the policy of our laws, it is of the very essence of an estate in fee simple absolute, that the owner, who is not under personal disability imposed by law, may alien it or subject it to the payment of his debts at any and all times; and any attempt to evade or eliminate this element from a fee simple estate, either by deed or by will, must be declared void and of no force.”

De Peyster against Michael, 6 New York, page 467, is a leading case on this subject and we quote the following from pages 492 and 493 :

“But it is a well-established principle that where an estate in fee simple is granted, a condition that the grantee shall not alien the land is void. Littleton says, ‘Also, if a feoffment be made on this condition that the feoffee shall not alien the land to any, this condition is void; because when a man is enfeoffed of lands or tenements, he hath the power to alien them to any person by law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him which should be against reason, and therefore such a condition is void.’

“Coke, in his commentary on this section, adds, ‘And the like law is of a devise in fee upon a condition the devisee shall not alien, the condition is void; and so it is of a grant, release, confirmation, or any other conveyance whereby a fee simple doth pass.’ (Co. Litt., 223a.) The language of Mr. Cruise is, ‘A condition annexed to the creation of an estate in fee simple that the tenant shall not alien, is void and repugnant to the nature of the estate given; for a power of alienation is an incident inseparably annexed to an estate in fee simple.’ (Cruise Dig. tit. 13, ch. 1, sec. 22.) The right of alienation passes by the grant of the fee as perfectly as if it were given by the express terms of the grant. Without such right the estate granted would be neither a fee simple nor any other estate known to the law. Lands



granted in fee on condition that the grantee shall not enjoy the lands, or shall not take the profits of the lands; or on condition that the heir of the grantee shall not inherit the lands; or on condition that the grantee shall not do waste, or on condition that his wife shall not be endowed, in all these and the like cases, the condition is void as repugnant to the estate. (Shep. Touchstone, 131.) 'A condition annexed to an estate given is a divided clause from the grant and therefore cannot frustrate the grant precedent, neither in anything expressed, nor in anything implied which is of the nature incident and inseparable from the thing granted.' (Hobart, 170.)

"The reason why such a condition cannot be made good by agreement or consent of parties is, that a fee simple estate and a restraint upon its alienation cannot in their nature co-exist. The ownership of the fee cannot exist in one person while the ownership of the right of alienation and of its fruit exists in a different person. This is a principle older than the common law of England. Grotius (Book 1, ch. 6, sec. 1) says, 'Since the establishment of property, men who are masters of their own goods, have by the law of nature the power of disposing of, or of transferring all or any part of their effects, to other persons; for this is the very nature of property; I mean of full and complete property'; and, therefore, Aristotle says, 'It is the definition of property to have in one's self the power of alienation'."

In *Mandelbaum vs. McDonnel*, 29 Mich. 97, the court said :

“Now, neither Littleton nor Coke, nor any of the annotators of Coke upon Littleton (so far as I have been able to discover) has mentioned any such qualification of the general rule laid down by Littleton in Sec. 360, nor anywhere intimated that such a condition against alienation for a particular time, or for a reasonable time, or for any time whatever, would be valid. And the same may be said of the other approved English works upon real estate; Blackstone’s Commentaries, Sheppard’s Touchstone, Bacon’s Abridgement, Cruise’s Digest, Comyn’s Digest, and all other English works which I have been able to examine. And if there is any English decision since the statute *quia emptores*, where the point was involved, in which it was held competent for a feoffer, grantor or devisor of a vested estate in fee simple, whether in remainder or in possession, by any condition or restriction in the instrument creating it, to suspend all power of the feoffee, grantee, or devisee, otherwise competent, to sell, for a single day, I have not been able to find it.”

The defendant has pleaded in its answer that this proviso in the Act of 1869 is repugnant to the grant, and read in the light of these authorities the testimony conclusively establishes the defense. It must be remembered that this grant was made “*to aid in the construction of*”—the road—“that the lands hereby granted shall be exclusively applied

to the construction of said road and to no other purpose, and shall be disposed of *only as the work progresses*" (page 3, printed Abstract). It is further provided in Section 5, page 5, printed Abstract, "and if said road is not completed within five years, no further sale shall be made and the lands remaining unsold shall revert to the United States."

To earn the grant, therefore, it was necessary to *complete the road* within five years—that is, on or before March 3, 1874. If the lands were to be of any use to "aid in the construction of the road" it is apparent they must be sold before March 3, 1874. If we have shown that during that time they could not have been sold "in 160-acre tracts" at *any* price, it goes without saying that Congress attached to the grant a provision, covenant, limitation, exception, condition or whatever we may choose to call it, which nullified the grant and made it valueless.

Eighteen witnesses were called by the defendant in support of the defendant's contention that these lands at the time of the grant and for many years thereafter could not be sold in 160-acre tracts at *any* price. For the Court's convenience, we call attention to the testimony of the following witnesses, found on pages indicated (printed Abstract) :

## LAND COULD NOT BE SOLD IN 160 - ACRE TRACTS AT ANY PRICE

T. W. Newland, pages 222 to 224.

S. A. Gurney, page 243.

W. J. Coates, pages 244 and 245.

A. E. Bushnell, pages 245 to 247.

J. D. Benham, page 230.

W. Z. Cotton, pages 225 and 226. (Offered to sell to anyone who would pay for making out the deed.)

H. W. Halverstott, pages 232 and 233.

George Norris, pages 234 and 235.

Albert E. Bettis, pages 235 to 237.

William Bettis, pages 237 and 238.

J. P. Stemler, pages 224 and 225. (Timber a nuisance.)

J. C. Haynes, pages 238 to 240.

R. E. Rose, pages 240 and 241.

John F. Hall (has been County Judge in Coos County for eight years; was County Surveyor from 1887 to 1896; came into Coos County in 1869, has remained there ever since), pages 226 and 227.

L. D. Smith, pages 227 and 228.

T. J. Klinkinbeard, pages 241 and 242.

Robert E. Shine, deposition, pages 294 to 297.

A. M. Simpson, deposition, page 396.

Each of these witnesses testified that for at least five years, and in fact for twenty years after the grant, the great body of this land could not have been sold for any sum in 160-acre tracts.

We have quoted from this testimony on pages



49 to 60 of our brief on the facts, and submit that it conclusively shows that for at least five years after this grant was made 90 per cent of the lands could not be sold in 160-acre tracts *at any price*.

Of course this testimony does not apply to the lands along the creeks and streams and contiguous to the sloughs—Isthmus, Catching, etc. This portion of the grant was valuable, but its area was limited, a very small percentage of the whole grant consisting of bottom lands. This clearly appears from the testimony of the following ten witnesses:

PERCENTAGE OF BOTTOM LAND WHICH  
WAS VALUABLE FOR CULTIVATION AND  
HILL AND TIMBER LAND NOT SUSCEPT-  
IBLE TO SETTLEMENT:

S. A. Gurney, page 243. Estimates bottom land  $1/10$ .

W. J. Coates, pages 244 and 245. Estimates bottom land  $1/10$ .

A. E. Bushnell, page 246. Estimates 1 acre on 160.

Geo. S. Gothro, page 319. Estimates 1 to 3 per cent.

D. J. Thrift, County Assessor, page 229. Estimates 3000 acres on whole grant, half a township, barren and of no value at any time.

W. Z. Cotton, page 225. Not over 20 per cent.

George Norris, page 234. Estimates 25 per cent.

J. E. Rose, page 240. Estimates it as very little—bottom land very small portion of grant. Balance

of grant being hills, precipitous, rocky and broken.

T. J. Klinkenbeard, page 242. Ten per cent would certainly cover it.

L. D. Smith, page 228. So small could not make guess.

As further illustrating, we call the Court's attention to Exhibit "A" of the Bill of Complaint, (pages 36 to 41, printed Abstract). This is a schedule of all lands sold by the Coos Bay Wagon Road Company up to May 31, 1875—6963 acres. This schedule shows that *all* these lands lie in Township 26 South, Ranges 12 and 13 West, and Township 27 South, Ranges 12 and 13 West, except 40 acres in Section 9, Township 28 South, Range 7 West (a small piece in Looking Glass Valley). A reference to the map (Defendant's Ex. 218, page 302, printed Abstract) shows that Townships 26 and 27 South are on Coos Bay, and *all* this land lies adjacent to the tide waters and the sloughs above mentioned. These were the only sales because no other land could be sold at any price.

In further explanation of this testimony and supplementing it, we show that while within the exterior limits of the grant there were a number of valleys and considerable area of agricultural land available for settlement, yet practically all of this land had been settled upon prior to the grant, and therefore never became the property of Coos Bay Wagon Road Company. On this point we ask the Court's attention to the following testimony:

## LAND IN VALLEYS ALL TAKEN UP

T. H. Coates, page 245.

A. E. Bushnell, page 246.

This testimony is conclusive and satisfies the mind that at the time of the grant, March 3, 1869, and for many years thereafter, the land embraced in the grant, being what was left after the settlement on the land in the valleys described by Coates and Bushnell, because of its character and location, could not be sold in 160-acre tracts to anyone at any price.

If the reading of the testimony left any doubt in our mind, an examination of the records of the Roseburg Land Office would set that doubt at rest. We call the Court's attention to exhibits from one to fourteen. These are maps of the lands embraced in the grant, made from the Land Office records and the original exhibits are sent to this Court by order of the lower court. These exhibits, taken together, constitute a complete record of the Government's *even* sections within the boundaries of the grant. For the Court's convenience we have tabulated the results deducible from these exhibits and present them herewith. They are identified by H. O. Pargeter (page 315, printed Abstract), and the showing by townships is tabulated on pages 62 to 96, Brief of Facts. We quote from page 96, Brief of Facts, the following:

## SUMMARY BY TOWNSHIP AND RANGE

## NUMBER OF ENTRIES

Township	Range	Prior to 1875	Between 1875 and 1880	Between 1880 and 1890	Since 1890
28 South,	7 West ....	23	3	9	26
28 South,	8 West ....	10	3	5	52
29 South,	8 West ....	4	4	9	23
28 South,	9 West ....	..	..	..	65
29 South,	9 West ....	2	2	2	35
28 South,	10 West ....	..	3	4	47
29 South,	10 West ....	..	..	1	22
27 South,	11 West ....	..	3	17	28
28 South,	11 West ....	..	6	17	51
26 South,	12 West ....	14	20	26	25
27 South,	12 West ....	5	12	26	35
28 South,	12 West ....	15	10	24	38
26 South,	13 West ....	10	4	..	1
27 South,	13 West ....	29	12	9	1
		—	—	—	—
		112	82	149	449

From an examination of this summary, the Court can at once see that the Government, within the limits of the grant, could not even give away its land.

An examination of the records of the State Land Department shows the same condition. Exhibit 216 is a certificate from the State Land Board as to the disposition of the school lands within the limit of the grant. The contents of this certificate are to be



found on pages 303 to 315, printed Abstract, and are summarized on page 98, Brief of Facts, as follows:

(And, first, we call the court's attention to a mistake in the printed record: Township 26 South, Range 12 West, appearing first on page 303, is duplicated on page 311; Township 28 South, Range 8 West, appearing first on page 309, is duplicated on page 312. This was an error in arranging matter for the printer. Outside of this, the list beginning on page 303 and extending to page 315 of the printed Abstract is correct.)

Arranging these Sections in a regular order beginning in Range 6 West, the Roseburg end of the Road, and running through Ranges 7, 8, 9, 10, 11, 12 and 13, the Coos Bay end of the Road, we get the following results

## SUMMARY BY TOWNSHIP AND RANGE OF SCHOOL SECTIONS.

### NUMBER OF ENTRIES.

Range	Township	Prior to 1875	Between 1875 and 1880	Between 1880 and 1890	Since 1890
6 West,	27 South.....	6	..	2	..
6 West,	28 South.....	3	2	1	..
7 West,	27 South.....	3	..	1	1
7 West,	28 South.....	5	2	3	..
7 West,	29 South.....	2	..	1	4
8 West,	27 South.....	2	..	..	4
8 West,	28 South.....	2	..	5	1
8 West,	29 South.....	1	1	1	6
9 West,	28 South.....	.	..	1	4
9 West,	29 South.....	2	..	8	..

Range	Township	Prior to 1875	Between 1875 and 1880	Between 1880 and 1890	Since 1890
10 West,	28 South.....	.	1	..	5
10 West,	29 South.....	.	..	5	..
11 West,	27 South.....	.	1	3	3
11 West,	28 South.....	.	1	9	3
12 West,	25 South.....	2	..	3	5
12 West,	26 South.....	2	1	3	5
12 West,	27 South.....	2	1	7	1
12 West,	28 South.....	.	4	8	2
13 West,	26 South.....	8	..	..	..
13 West,	27 South.....	7	..	..	..

These tables speak for themselves and need no interpretation. The grant made by Congress was intended to be of some *immediate* benefit to the grantee. The benefit must be derived within five years from the date of the grant, March 3, 1869. But if the claim now set up by the Government is to be allowed Congress failed to accomplish its purpose—the only purpose it could have—the only purpose that could justify the passage of the Act, and this legislation was a foolish and vain thing. True, Congress does not say to the State “you shall not sell,” but if this suit is properly brought it might as well have said so.

If it be true that when the right of alienation is forbidden by the letter of the statute—the deed or devise—the attempted condition is void, can it be doubted that the same result follows where the terms of the proviso, while not forbidding aliena-

tion *in terms*, makes alienation impossible *in fact*? To illustrate:

Suppose this second proviso, instead of being worded as it is, should have been framed thus: "Providing further, that the grant of lands hereby made shall be upon the condition that the lands shall be sold to persons over the age 100 years only, and in quantities not greater than one acre to each person and at a price not exceeding \$2.50 per acre." Could anyone doubt the invalidity of the attempted restraint?

The rule announced by the courts became a part of settled judicial procedure, not because of the *language* of the grant, but because of the *effect* of the language. The right of alienation was considered an inseparable element in a fee simple title. It could not be taken away and the title remain. And so, whether the grantor forbade the exercise of it in terms or created a situation which made its exercise impossible in fact, the grant was sustained and the attempted debasement of the title was declared void.

The testimony before the Court, and this transcript of the Land Office Records, show that up to 1875, covering the whole period allowed for the construction of the road in five entire townships, 28-9, 28 and 29-10, 27 and 28-11, not a single entry was made. In 29-9 two entries only were made; in 29-8 four entries, and in 27-12 five entries, and during all this time the Government was *giving away* its

land and no one would take it, although they might have had it for the asking.

As to the claim made by the Government that the lands involved in this suit are agricultural lands or are adapted to settlement and cultivation because, after the timber is removed they will become such, it is sufficient to say that the testimony does not sustain it and if it did the fact would be immaterial. On this point we call the Court's attention to the case of the United States against Budd, 43 Federal 630, afterwards affirmed by the Supreme Court of the United States, 144 U. S. 154, 166, where this contention is disposed of. Mr. Justice Brewer, writing the opinion of the Supreme Court, says, among other things: "If it be suggested that this dense forest might be cleared off and then the land become suitable for cultivation, the reply is, that the statute does not contemplate what may be, but what is. Lands are not excluded by the scope of the Act, because, in the future, by large expenditures of money and labor they may be rendered suitable for cultivation. It is enough that at the time of the purchase they are not in their then condition fit therefor. The statute does not refer to the probabilities of the future, but to the facts of the present."

### BOA FIDE PURCHASER

The defendant is an innocent purchaser in good faith, for full value and without notice. As such its title is perfect.

It is unnecessary to multiply authorities on this



point. There is no conflict in the decisions. A *bona fide* purchaser takes practically a new title and the law guarantees it. His title is not only safe in his own hands, but he may transfer it to one who had actual knowledge of a given defect and the transferee will take a good title.

In the United States against Detroit Timber Company, 131 Federal, pages 677 and 678, Judge Sanborn, speaking for the Court, said:

“Finally, this is a suit in equity. The equitable claims of the United States appeal to the conscience of a chancellor with the same, but with no greater or less, force than would those of an individual in like circumstances. *Bona fide* purchasers are the especial favorites of courts of equity. In *Boone vs. Chiles*, 10 Pet. 177, 209, 9. L. Ed. 388, Mr. Justice Baldwin, in delivering the opinion of the Supreme Court, said:

“‘A court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction. (Sugd. Vend. 722.) Strong as a plaintiff’s equity may be, it can in no case be stronger than that of a purchaser who has put himself in peril by purchasing a title and paying a valuable consideration without notice of any defect in it or adverse claim to it; and when, in addition, he shows a legal title from one seized and possessed of the property purchased, he has a right to demand protection and relief (9 Ves. 30-34), which a court of equity imparts liberally.’”

This was affirmed by the Supreme Court in 200 U. S., page 321.

United States against Willamette Valley Railroad Company, 42 Federal, 360.

United States against California & Oregon Land Co., 148 U. S. 40 and 41.

In United States vs. Willamette Valley & Cascade Mountain Wagon Road Co., 55 Federal 711, the Court had under consideration the wagon road grant of July 5, 1866. On March 2, 1889, Congress passed an Act "To determine the question of the seasonable and proper completion of the said road in accordance with the terms of the granting act either in whole or in part, and the legal effect of the several certificates of the Governor of Oregon of the completion of the road, and to declare forfeited to the United States all land not earned in accordance with said Act, saving and reserving the right of all *bona fide* purchasers of such lands for valuable consideration." And providing further that said suit or suits should "be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried."

In pursuance of that Act the suit was brought to forfeit the grant. The defense of innocent purchaser was set up by the defendant, and considering this contention of the defendant's attorneys, the Court (Judge Gilbert) said:

"The contention of counsel for the United States that the defendants could not have occupied the

position of innocent purchasers so long as patents for the land had not issued, is not supported by the authorities. The grant was a grant in *praesenti*. The language of the granting clause was 'that there be and hereby is granted to the State of Oregon.' This made it a present grant of an estate in fee upon condition subsequent, notwithstanding the fact that the lands were required to be subsequently selected. *U. S. vs. Willamette Val. & C. M. Wagon Road Co.*, 42 Fed. Rep. 357; *Schulenberg vs. Harri-man*, 21 Wall. 44; *Missouri, K. & T. Ry. Co. vs. Kansas Pac. Ry. Co.*, 97 U. S. 491; *Van Wyck vs. Knevals*, 106 U. S. 360 (1 Sup. Ct. Rep. 336). Patent was not necessary to convey the title, and when it issued it was only evidence of a title that had already passed. *Rutherford vs. Green's Heirs*, 2 Wheat. 196; *Wright vs. Roseberry*, 121 U. S. 488 (7 Sup. Ct. Rep., 985). The defendants are clearly shown to be *bona fide* purchasers. As such, their rights would be conserved in a court of equity under the general principles of jurisprudence governing the Court irrespective of the statute, but in this case Congress has seen fit to expressly declare, in the Act authorizing the prosecution of this suit, that the interests of all such purchasers, if any there be, shall be protected."

After a discussion of the effect of the failure of the Government to claim forfeiture within reasonable time, Judge Gilbert said:

"These facts render it inequitable that the United

States should at this late date and after such long non-action and acquiescence, assert title to the lands, or claim a forfeiture of the same for a failure to construct the road within the five years succeeding the land grant of July 5, 1866."

That under these authorities the Southern Oregon Company was an innocent purchaser for full value is conclusively established by the testimony.

### WE REFER THE COURT

First. To the deposition of W. W. Crapo.

Mr. Crapo was a lawyer, a capitalist and a man of wide experience. He had been connected with land grant railroads before this and explains fully his relation to them. He testifies that neither himself nor any officer of the Southern Oregon or Oregon Southern Improvement Company, as far as he knew, ever had any knowledge of any defects in the title to the Coos Bay Wagon Road land. (See pages 19 to 29, Brief of Facts.)

Second. To the testimony of William Rotch.

Mr. Rotch is another witness for the defendant and testifies to the same thing. Mr. Rotch was treasurer and assistant secretary of the Oregon Southern Improvement Company from April, 1883, to August, 1884. His testimony is complete and full to the effect that neither himself nor anyone had any knowledge of any alleged defect in the Coos Bay Wagon Road title. He explains the situation of the company and the fact that the Oregon Southern



Improvement Company was insolvent, the occasion of the foreclosure proceedings and the fact of the full value having been paid for the land. (See pages 29 to 45, Brief of Facts.)

Third. J. A. Yoakam.

Mr. J. A. Yoakam was in the employ of the Oregon Southern Improvement Company from 1883—had charge of their logging and land interests, etc.—and was manager afterwards. His testimony is found from page 279 to 283, printed Abstract. He goes fully into the question and testifies that at no time while he was in the employ of the company was it suggested by anybody that there was a defect in the title to the land because of any limitation in the grant. (See pages 282 to 283.)

Fourth. Mr. Robert E. Shine.

Mr. Robert E. Shine was a witness, his testimony being taken in San Francisco by deposition. Mr. Shine was bookkeeper and secretary and local manager for about ten years, following Mr. Yoakam. He testifies that this question of title never was raised by anybody and that until the time of Nicholls' suit he never heard of the pretended limitation contained in the grant as to the power of limitation. (See page 45, Brief of Facts.)

We call the attention of the Court to the elaborate abstract of title furnished by Hazard & Wilson, Defendant's Abstract No. 207 and opinion ac-

companying the same. (Defendant's Exhibit No. 219, pages 371 to 379, printed Abstract.)

This testimony taken into consideration with all the circumstances surrounding the transfer of title from Besse to the Oregon Southern Improvement Company, the foreclosure proceedings and subsequent transfer of title to the Southern Oregon Company, proves, as satisfactorily as any testimony ever can prove, that Besse, the Oregon Southern Improvement Company and the Southern Oregon Company were *bona fide* purchasers for full value.

WE PLEAD FURTHER IN DEFENSE TO THE  
GOVERNMENT'S SUIT THAT THE GOVERN-  
MENT IS ESTOPPED TO ASSERT A CLAIM  
FOR FORFEITURE

It has been so often declared by the courts that it may well be considered substantive law that when the United States goes into court it goes in as any other suitor and is as much bound as any other suitor by the rules of equity, and may be estopped in the same manner. In no case is this doctrine more emphatically declared than in the case of the United States vs. the Willamette Valley & Cascade Wagon Road Company, 54 Federal 807, 811, 812. Judge Gilbert, writing the opinion in that case, says:

"No good reason can be offered why the United States, in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience. The defense of estoppel stands upon different ground from that

wrongs which it would promptly condemn if practiced by one of them upon another.”

See *United States vs. M. K. & T. Ry. Co.*, 37 Federal 68, 70.

See *United States vs. McLaughlin*, 30 Federal 147, 161.

See *Jones vs. United States*, 96 U. S. 24, 29.

In *United States vs. Dalles Military Road Co.*, 41 Fed. 493, and *United States vs. Oregon Central Military Road Co.*, 41 Fed. page 501, the then Circuit Court for the District of Oregon had under consideration the grant to The Dalles Military Road Company on a bill filed by the Attorney General, praying for a forfeiture of lands granted by the Act of Congress, February 25, 1867. Judge Sawyer dismissed the bill and said, among other things, on page 500:

“It seems to me that the cause of suit ought to be regarded as stale, so as to render it inequitable, under the circumstances of the case, to prosecute it now within the established principles of equity jurisprudence. \* \* \* Whatever is inequitable, as between man and man, in their dealings with each other, should, also, be deemed inequitable, as between the United States and those with whom they condescend to deal, under like circumstances; and, I take it, that the same decree is proper in this case, that would have been proper, had a private party been the grantor, and had he by both his positive, affirmative action, and his non-action, for

so long a time, given purchasers from his grantee so good reason to believe, that he was fully satisfied with the performance of the conditions of the grant."

We introduce in evidence the record of four suits brought by the Government on this very grant, to wit:

United States, Complainant, vs. The Coos Bay Wagon Road Co. and the Southern Oregon Co., Defendants. Bill filed February 18, 1896. (Defendants' Exhibit 240.)

United States, Complainant, vs. The Coos Bay Wagon Road Co., Southern Oregon Co., *et al.*, Defendants. Bill filed February 29, 1896. (Defendants' Exhibit 241.)

United States, Complainant, vs. The Coos Bay Wagon Road Co., Southern Oregon Co., *et al.*, Defendants. Bill filed February 29, 1896. (Defendants' Exhibit 242.)

United States, Complainant, vs. The Coos Bay Wagon Road Co., alone, Defendant. Bill filed August 25, 1897. (Defendant's Exhibit 243.)

In this last suit the bill is a bill of discovery and the prayer is:

*"Your orator prays for the construction of the grant and a decree defining the rights of the parties in view of the grant and the proceedings thereunder."*

The Wagon Road Company answered (printed Abstract, page 520) :

"That said lands were sold with other lands de-



rived by it from said grant, amounting altogether to 87,405.18 acres, at the price of \$1.00 per acre. *Said lands were sold for cash to John Miller, May 31, 1875, for the consideration of \$1.00 per acre, amounting in the aggregate to \$1,139.59."*

Taking these cases as they were filed, we find that in Exhibit 240, the Government filed its Bill of Complaint February 18, 1896, against the Coos Bay Wagon Road Company and the Southern Oregon Company, to cancel the Government's patent to the northeast quarter of the northeast quarter of Section 9, Township 28 South, Range 7 West, W. M. In its bill the Government pleads the Act of March 3, 1869, the Act of the Legislative Assembly of the State of Oregon of October 22, 1870, the Act of June 18, 1874, the certificate of the Governor of the State of Oregon, 19th of September, 1872, certifying that the Coos Bay Wagon Road Company had constructed the road, and the patent of the 12th day of February, 1875 (Patent No. 1 of the Government's Bill in this case)—all exactly the same as are pleaded in the bill here. It was alleged then that this quarter section was entered as a homestead on the 22d of January, 1863, and prior to the Coos Bay Wagon Road Grant, and that therefore the patent as to this quarter section should be canceled. On page 414 of the printed Abstract of Record, the Government's Bill of Complaint says: "And your orator further shows unto your honors that it is informed and believes and so charges the fact to

be that the Southern Oregon Company, defendant herein, claims to be the owner in fee simple of said northeast quarter of the northeast quarter of Section 9, Township 28 South, Range 7 West, W. M., its claim of title being as follows, viz., a deed to it through a chain of *mesne* conveyances from the patentee; that said Southern Oregon Company claims possession of said lands, and the same together with the improvements thereon are of the value of \$1600."

A demurrer was interposed by the defendant, and was sustained and a decree entered dismissing the bill (page 418, printed Abstract of Record).

In this suit the Government was advised of the position of the Southern Oregon Company and its claims and had abundant opportunity, if it desired to do so, to bring its suit for cancellation of the whole grant as it has done here, instead of for only one quarter section.

Exhibit 241 is found on pages 419-438 of the printed Abstract of Record. This was a suit brought February 29, 1896, by the United States vs. Coos Bay Wagon Road Company, Southern Oregon Company, T. R. Sheridan, J. P. Sheridan, R. S. Sheridan, Margaret Briggs, Helen M. Rook and Mary A. Rook. The Bill of Complaint is quite lengthy and pleads every fact pleaded in the Bill of Complaint in the present case. It then pleads (page 426, printed Abstract) the O. & C. granting Act of July 25, 1866, and alleges that the O. & C. Co. definitely fixed the line of its road across the grant to the State of Oregon for the Coos Bay Wagon Road, of date

March 3, 1869. It alleges that an error was committed in issuing patents to the Coos Bay Wagon Road Company for the lands described in the bill, because of the prior definite location of the O. & C. road over these lands. The different defendants, Sheridans, Briggs, Rook, etc., are made defendants because they claimed to be the owners in fee simple by deed from the Coos Bay Wagon Road Company, the patentee.

It is alleged (page 432 of the printed Abstract of Record) that the Southern Oregon Company claims to be the owner of all the lands except those claimed by the Sheridans, etc., and that the same are valued at \$600,000.00. The prayer of the bill is that the patent conveying *all* these lands "may be set aside, canceled and declared null and void, and that the several *mesne* conveyances from the said Coos Bay Wagon Road Company to the defendants herein may be set aside, canceled and declared null and void, and your orator prays all other and proper relief in the premises."

A demurrer was filed by the Coos Bay Wagon Road Company and the Southern Oregon Company, which demurrer was sustained (page 436, Abstract) and the complaint dismissed (page 437, Abstract).

The Government knew when it filed this bill, February 29, 1896, everything it knows now about these lands. It admits knowledge in its bill of the claim of the Coos Bay Wagon Road Company and the Southern Oregon Company, and of the prior *mesne* conveyances leading up to the transfer to the

Southern Oregon Company, and might have brought the present suit then as well as it could later on. Some effort is made to defeat defendants' claim to an estoppel on account of this complaint, by introducing in evidence a letter from Dan R. Murphy, United States District Attorney, to the Attorney General, of May 21, 1897, but this proves nothing and is immaterial. It isn't of importance to determine *why* Judge Bellinger dismissed the bill, but it *is* important to know that the bill was filed and that it was dismissed and that the Government could in that bill or in lieu of that bill, by a different bill, if you please, have litigated every thing that is presented for litigation in the bill in this case.

Exhibit 242 is the Judgment Roll in the case of the United States vs. Coos Bay Wagon Road Company, Southern Oregon Company, Lorens, John and Mathias Vogl, W. S. Hamilton, Mary Mark, Charlotts and Frederick Elliott, John Weaver, John Norman and C. C. Bonebrake. In the complaint in that suit, filed February 29, 1896, all the facts were alleged as in the other cases and in this suit, as to the Acts of Congress, the Legislature of the State of Oregon, the completion of the road and issuance of patents. It was alleged that Samuel C. Braden prior to March 3, 1869, entered the northwest quarter of the southwest quarter of Section 25, Township 27 South, Range 12 West as a homestead. It was further alleged that certain lands described in the bill amounting



to 1099.59 acres lay entirely without the limits of the grant of March 3, 1869, and that the patent conveying said lands to the Coos Bay Wagon Road Company was issued erroneously. It is alleged that Lorenz, John and Mathias Vogl claimed the west half of the northwest quarter of Section 33, Township 25 South, Range 12 West, through *mesne* conveyances from said Southern Oregon Company, and that it was worth \$2400.00. The same allegations are made in regard to W. S. Hamilton concerning Lot 4 of Section 5, Township 26 South, Range 12 West, and that these premises were worth \$3000.00. Mary Mark comes in the same category with the northwest quarter of the northwest quarter of Section 27, Township 26 South, Range 12 West, and it is alleged these premises are worth \$1250. It is alleged that Charlotte and Frederick Elliott claim in the same way the northwest quarter of Section 13 and the northwest quarter of the southwest quarter and Lot 1 of Section 13, Township 26 South, Range 13 West, and it is alleged these premises are worth \$8000.00. It is alleged that John Weaver claims in the same manner the southwest quarter of the northeast quarter of Section 13, Township 26 South, Range 13 West, and that said premises are worth \$1000.00. It is alleged that John Norman claims in the same manner the northwest quarter of the northeast quarter of Section 13, Township 26 South, Range 13 West, and that said premises are worth \$2750.00. It is alleged that C. C. Bonebrake claims the southeast quarter of Section 1,

Township 26 South, Range 13 West, and that said premises are worth \$2000.00. It is alleged that the Southern Oregon Company claims all the rest of the land described in said bill, and that said land is worth \$22,000.00, and that said Southern Oregon Company claims by chain of *mesne* conveyances from the Coos Bay Wagon Road Company.

The prayer of the bill is "that the patent purporting to convey the title to the said above-described lands may be set aside, canceled and declared null and void, and that the several *mesne* conveyances from said Coos Bay Wagon Road Company to the said defendants herein may be set aside, canceled and declared null and void." (Page 453, printed Abstract.)

To this bill an answer was filed by the Coos Bay Wagon Road Company (pages 456-471, printed Abstract) and by the Southern Oregon Company (pages 472-494, printed Abstract), and a replication by the Government (pages 494-495, printed Abstract). To this replication a demurrer was filed (pages 495-496, printed Abstract), and the demurrer was sustained and the Government's bill dismissed (page 497, printed Abstract).

It is unnecessary to comment upon the filing of this demurrer or the disposal of it. Of course, there is no such practice, but it is of no importance to consider here the reasons which brought about the dismissal of the bill. The matters we are calling attention to are contained in the bill and the answers filed by the Coos Bay Wagon Road Company

and Southern Oregon Company, and the knowledge that the Government necessarily had of the chain of title of the Southern Oregon Company. It admits in its bill its knowledge of the disposition of these lands by the Coos Bay Wagon Road Company and is further advised by the answers of the Coos Bay Wagon Road Company and the Southern Oregon Company of the reasons which warranted, at least in the judgment of the defendants, such disposition.

From pages 485 to 491 of the printed Record is the complete chain of title. Every deed mentioned in the complaint in the present suit is set out there and the Government was advised of the deeds to Miller, Besse, the Southern Oregon Company, etc. If the Coos Bay Wagon Road Company violated the terms of the grant in its deed to Miller or to Besse, the Government was advised of it then, if it did not know it before, and might have asked the forfeiture then as well as it does now and with as much reason.

Exhibit 243 (page 500 to 528 of the printed Abstract) is the Judgment Roll in the case of the United States vs. Coos Bay Wagon Road Company. The bill in that case was filed August 25, 1897. It is for the same relief and upon the same alleged facts as appear in Exhibit 242. Discovery is sought by the complainant and interrogatories are appended at the foot of the bill and the defendant is requested to answer the following questions:

First. Whether any of the lands described herein have been sold?

Second. What are the particulars of such sale, if sales were had?

Third. How were the lands sold, for cash or on deferred payments; to whom were the lands sold; when were they sold, and for what consideration?

Fourth. Were the lands, if sold, sold with or without covenants of warranty?

Fifth. If any of the lands were sold on deferred payments, state the particulars of contracts of such sales; what has been paid thereon; how much is still due, and when the same is payable?

The Coos Bay Wagon Road Company filed its answer September 8, 1898, and answered these questions categorically. To the third interrogatory the defendant said "said lands were sold for cash to John Miller, May 31, 1875, and for the consideration of \$1.00 per acre, in the aggregate \$1139.59. (Printed Abstract, p. 520.) Decree was entered August 7, 1901, canceling the patent to Braden for the northwest quarter of the southwest quarter of Section 25, Township 27 South, Range 12 West, and granting complainant the United States, judgment against defendant Coos Bay Wagon Road Company for \$1099.59, "being the value of 1099.59 acres of land described in Plaintiff's Bill of Complaint." (Printed Abstract, p. 528.)

This 1099.59 acres of land was included in the deed to John F. Miller and passed on down to the Southern Oregon Company by the chain set out in pages 488, 489, 490 and 491 in the printed Abstract of Record. It was sold to Miller at \$1.00 an acre



and the Government takes judgment in this suit (Exhibit 243) for \$1.00 an acre, thus ratifying as far as anything can be ratified, the action of the Coos Bay Wagon Road Company in selling the land for that price. This 1099.59 acres is described in the bill, Exhibit 243, as follows (page 505, printed Abstract) :

TOWNSHIP 25 SOUTH, RANGE 12 WEST

	Section
S.E. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ .....	19
N. $\frac{1}{2}$ of N.E. $\frac{1}{4}$ , N. $\frac{1}{2}$ of N.W. $\frac{1}{4}$ , S.E. $\frac{1}{4}$ of N.W. $\frac{1}{4}$ , and S.W. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ .....	29
W. $\frac{1}{2}$ of N.W. $\frac{1}{4}$ .....	33

TOWNSHIP 26 SOUTH, RANGE 12 WEST

N. $\frac{1}{2}$ of N.W. $\frac{1}{4}$ , N.W. $\frac{1}{4}$ of S.W. $\frac{1}{4}$ .....	5
N.W. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ , N. $\frac{1}{2}$ of N.W. $\frac{1}{4}$ , S.W. $\frac{1}{4}$ of N.W. $\frac{1}{4}$ , N.W. $\frac{1}{4}$ of S.W. $\frac{1}{4}$ .....	7

TOWNSHIP 26 SOUTH, RANGE 13 WEST

N.W. $\frac{1}{4}$ , W. $\frac{1}{2}$ of N.E. $\frac{1}{4}$ , N.W. $\frac{1}{4}$ of S.W. $\frac{1}{4}$ , and Lot 1 .....	13
W. $\frac{1}{2}$ of S.E. $\frac{1}{4}$ , S.E. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ .....	1

If we turn now to page 133, printed Abstract, we find that the bill in the present case seeks a forfeiture of some of this same land, to wit:

TOWNSHIP 25 SOUTH, RANGE 12 WEST

	Section
S.E. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ .....	19
N. $\frac{1}{2}$ of N.E. $\frac{1}{4}$ , N. $\frac{1}{2}$ of N.W. $\frac{1}{4}$ , S.E. $\frac{1}{4}$ of N.W. $\frac{1}{4}$ , S.W. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ .....	29

## TOWNSHIP 26 SOUTH, RANGE 12 WEST

Section

N.W.  $\frac{1}{4}$  of the N.E.  $\frac{1}{4}$ , N.E.  $\frac{1}{4}$  of N.W.  
 $\frac{1}{4}$ , and Lots 1, 2, 3 and 4..... 7

## TOWNSHIP 26 SOUTH, RANGE 13 WEST

W.  $\frac{1}{2}$  of S.E.  $\frac{1}{4}$  ..... 1

It was further insisted in the court below that in these suits the Government sought to cancel the patents to lands "entirely without limits of the grant" and that therefore "there is nothing inconsistent between the earlier cause of action and the instant case." But this is not correct. In the first suit brought (Exhibit 240, Bill filed February, 1896), the Government asks for a cancellation of the patent to the Northeast Quarter of the Northeast Quarter of Section 9, Township 28 South, Range 7 West. A glance at the map (Exhibit 218), shows that this whole section lays right in the center of the grant in the Looking Glass Valley.

There were two suits brought February 29, 1896 (Exhibits 241 and 242). In Exhibit 241, it was claimed that all the lands described in the Bill, being 30,044.46 acres, was within the boundaries of the grant to the Coos Bay Wagon Road Company, but that the O. & C. Company took it because that Company on March 26, 1870, filed its map of definite location under the grant of July 25, 1866. A demurrer was filed by the Coos Bay Wagon Road Company and the Southern Oregon Company to this Bill, which demurrer was sustained January 12, 1897, and the Bill dismissed June 12, 1897. All these lands

lay in Townships 28 and 29 South, and Ranges 6, 7, 8 and 9 West.

Referring again to the map (Exhibit 218), we find that the description of the different parcels of land set out in the Bill in this suit were included in a strip of land four miles wide lying directly across the Coos Bay grant from north to south. It was alleged in the Bill in that suit (Exhibit 241), that all these lands being in the place limits of the O. & C. grant of 1866, and having been subsequently patented to the Coos Bay Wagon Road Company, should go to the O. & C. Company by right and the Coos Bay Company's patent should be cancelled.

Referring now to the Bill in the present suit and Exhibit "E" thereof (pages 131 to 138, printed Abstract of Record), we find that all the lands included in the Bill in Exhibit 241 are included in the Bill in this suit and cancellation of the patents is demanded here for breach of condition.

In Exhibit 242 (Bill filed February 29, 1896, the same day as in Exhibit 241), a cancellation of patents is asked for covering lands in Townships 25 South, Range 12 West; 27 South, 12 West; 26 South, 12 West, and 26 South, 13 West. There is but one small piece in 27 South, 12 West—the Northwest Quarter of the Southwest Quarter of Section 25. This is the Braden piece hereinafter referred to. It is alleged that the lands in 25 South and 26 South, 12 West, and 26 South, 13 West, lie outside the limits of the grant. But a reference to the map (Exhibit 218), shows that this is entirely erroneous, as 26

South, 12 West, and 26 South, 13 West, are both within the limits of the grant. This is the Coos Bay section, the most valuable part of the grant. The sections involved in Exhibit 242 are 5 and 7 in 26 South, 12 West, and 1 and 13 in 26 South, 13 West, and cancellation of the patents to these lands is sought because they lie *outside the grant*. Exhibit "H" of the present Bill asks for a cancellation of the patents to the same lands because they lie *inside the grant*.

Argument could add nothing to the record as made in these cases. The defendant in this case was defendant in three of them. The complete defense as now set up was pleaded in these suits. The Government was advised of this defendant's position and claims. The record advised the Government of the sale to Miller, May 31, 1875, and in Exhibit No. 242 the complete chain of defendant's title was pleaded. The Government could have asked for forfeiture at the time it brought each of these cases with as much right as it can do it now, but it did not; and inasmuch as it did not do it then it cannot do it now. The Government cannot be forever litigating this grant.

Whether the different provisos in the Act of March 31, 1869, created "conditions," or were covenants only, they were conditions or covenants that the Government had a right to waive if it saw fit. And it did waive them. For forty years this road has been completed and the grant earned. During



all that time the different holders of title, in the order of their holdings, have openly and notoriously claimed the fee simple title to this property. The Coos Bay Wagon Road Company, as appears from the record, as early as April, 1880, brought suit against Charles Crocker (6 Sawyer, page 574). In that suit the sale of 96,000 acres of land to Miller was pleaded and the contract was enforced in this Court.

The different suits referred to above, brought by the Government, show that during the entire period down to the bringing of this suit, the Government must have known and approved the dealings of the Coos Bay Wagon Road Company with this grant.

Our position is this: If in the various suits above referred to, and the records of which have been introduced in evidence, the Government *might* have litigated the question of forfeiture, it was compelled to do it. And inasmuch as it did not do it, it is now estopped to open up the controversy again. In the case of the United States vs. California & Oregon Land Company, 192 U. S. 355 (24 Supreme Court Reporter, page 266), the Supreme Court in effect decided this case. In that case the bill was filed by the Government to cancel certain patents issued to the Oregon Central Military Road Company, under the Act of July 2, 1864. The defendant, California & Oregon Land Company, claimed title through *mesne* conveyances from the patentee. The grounds for asking the cancellation of the patents were that the lands in controversy were within the

Klamath Indian Reservation, and therefore did not come under the grant—that they were “lands heretofore reserved to the United States,” and that they belonged to the Indians, and for that reason patents to the railroad company should be canceled in order that the Indians might afterward get the lands. Prior to this time, however, the Government had brought a suit to cancel the whole grant to the Oregon Central Military Road Company for breach of condition. That is to say, it was alleged that the wagon roads were not completed within the time required by the grant by the United States and the bill prayed forfeiture, as for breach of condition. The Government was defeated in its former suit and the bill dismissed. Referring to this dismissal, Mr. Justice Harlan, writing the opinion in the second suit, said: “But if the United States was at liberty to state all its grounds for claiming the land, it was bound to do so on the same principle and rules of jurisprudence as other suits in equity are therein tried.” The Supreme Court dismissed the Government’s bill for the reason, therefore, that the Government was estopped because in its first bill, asking for a forfeiture, generally, of all the lands embraced in the grant, because of non-completion of the road, it might have also included a prayer for the cancellation of the patents involved in the second suit for the reasons set out in the bill in the second suit.

If, therefore, the Government is barred from litigating title to a *portion* of the grant because it

had once before brought a suit to cancel the *whole* grant upon another ground, we submit that it is estopped here to bring a suit to cancel the *whole* grant for a cause existing at the time the former suits were brought to cancel a *part* of the grant, and which might have been made a part of the bills in either of these cases.

## RIGHT OF GOVERNMENT TO BRING SUIT

That these cases constitute a record which should estop the Government from now litigating the question of forfeiture seems apparent. Counsel for the Government in his brief filed in the lower court, sought to break the force of this presentation by claiming that at the time the four suits above enumerated were begun and tried, the Government could not have asserted breach of condition and demanded forfeiture. This extraordinary claim was stated as follows: "Whether the defendant or any of its predecessors in title, subsequent to the State, had forfeited the grant, was not presented in any of the cases named in the answer, for the simple reason that the Executive Department of the Government *was not empowered at that time to present it. The authority to do so did not come into existence until the passage of the Act of April 30, 1908.* This suit is in pursuance of that authority—that law. *When those suits were commenced, the law forbid the inclusion of the present cause of action.* It would be an anomaly to say that a matter which

the law did not allow the court to consider had been lawfully decided by it."

It would be sufficient answer to this claim of counsel to say that if it were necessary, in order to authorize the beginning of a suit in equity, such as this is, to have a legislative declaration authorizing it, such legislative declaration could have been obtained as completely before these suits were brought as it was afterward obtained, April 30, 1908, so that the claim that the suits could not have been brought at that time for a forfeiture is without foundation.

But we do not concede the law as stated by counsel. On the oral argument, the same doctrine was advanced and it was asserted that the District Court so held in the United States against the Oregon & California Railroad *et al.*, 186 Federal 925. No such holding was made in that case nor in any case, so far as we are advised. It will be remembered that in the Oregon & California case the contention of the railroad company was, that the bill lacked equity for the reason that the proceeding to enforce a forfeiture was essentially an action at law, and that there should be "office found" to sustain jurisdiction. The whole controversy as to the jurisdiction of the court was based on this one contention. In the opinion, 86 Fed., page 926, the Court says: "*The essential and particular contention of counsel for defendant is that they are entitled to a common-law proceeding, and that this contemplates a trial by jury and not a proceeding in equity.*" Answering this claim of the railroad



company, the Court held that the bill in that case, on the equity side of the Court, following the resolution of Congress directing such proceeding, was proper and the Court had jurisdiction. There was no decision, and no call for any decision, that the Government could not have proceeded if it were not for the Act of April 30, 1908.

The cases relied upon by counsel are:

United States vs. Repentigny, 5th Wallace  
211.

Schulenberg vs. Harriman, 21 Wall. 44.

United States vs. New York Indians, 170  
U. S., page 1.

United States vs. Northern Pacific, 177 U. S.,  
page 435.

As we presume this same claim will be made here, we will discuss it in advance, to avoid the necessity for a reply brief.

Answering these authorities in the order of their presentation, we say:

First. That the doctrine announced by counsel was not declared in the Repentigny case at all. In that case the grant was made by the Governor of Canada to Louis de Boone and Count Repentigny. De Boone never took possession of the grant and Repentigny was only in possession for a time, and when war broke out in England he left to engage in military service for his government and never returned. Congress in an Act passed April 19,

1860, directed the filing of the bill. It is unnecessary to go into a detailed examination of the facts brought out by the testimony. It is sufficient to say that the question of whether the suit was properly brought was raised. The question apparently being whether the conditions in the grant were broken and, if so, whether the title to the land reverted automatically because of the breach. The Court held, in line with all authorities, that such result could not follow, and in reference to the proper procedure said, page 267, 5th Wallace: "And we agree that before a forfeiture or reunion with the public domain could take place, *a judicial inquiry should be instituted*, or, in the technical language of the common law, office found or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of resuming the forfeited grant, is subject to the legislative authority of the government. *It may be after judicial investigation*, or by taking possession directly, under the authority of the government, without these preliminary proceedings." This is all the Court held, and it is very far, indeed, from saying that the Court had not jurisdiction without a legislative authority authorizing the suit.

Second. 21st Wall. 44, *Schulenberg vs. Harriman*, is a familiar case in railroad and land grant litigation. In that case there was a grant, June 3, 1856, to the State of Wisconsin of certain lands to aid in the construction of railroads. There was a

condition in the grant and the condition was broken. Harriman, and those whom he represented, cut certain timber upon lands being a portion of the grant. Schulenberg and others claimed the timber and brought replevin against Harriman. It was claimed in the case that, inasmuch as the condition in the grant was broken, the lands embraced in the grant automatically went back to the Government, without any decree of the court or other proceedings declaring forfeiture. And it was in relation to this claim, and this claim only, that the Court said, on page 6: "If the grant be a public one it must be asserted by *judicial proceedings authorized by law*, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement." How this can be construed into a declaration that it needed a legislative authority to begin a suit for forfeiture it is difficult to understand, and yet counsel claims it.

Third. The next case in order is the New York Indians, case 170 U. S., page 1. The very same claim was set up, that where there was a condition in a grant and a breach of the condition, that forfeiture took place automatically and the land reverted, as of course. Answering this claim, the Court held: "Upon a breach of it (the condition)

the Government might decree a forfeiture, but had no power by simple executive action to re-enter, take possession of the lands, and sell them." The Court then quotes from the 5th and 21st Wall. as containing a statement of the law governing the case. This case, therefore, does not sustain counsel's contention either.

Fourth. The next case is the United States vs. Northern Pacific, 177 United States, page 435. In that case the question here presented did not arise at all. And the Court, Justice Shiras writing the opinion, was particular to limit the decision to the point in controversy. As to the final decision, he said: "It is always safe in approaching a question of this kind to have regard to the pleadings in the case. Otherwise there is danger that the court and counsel may be drawn into discussions outside of the case actually presented." The question presented in that case was where the eastern terminus of the road was, that is, whether it was Duluth or Ashland. The Court stated the controversy thus: "*In other words, if we understand the position, it is claimed on Section 8 of the Act, July 2, 1864, non-completion of the railroad within the time limited of itself operates as a forfeiture; the grant immediately reverts to the Government; and courts must so hold on the simple statement of the fact of non-compliance within the limit. We do not understand this to be a correct statement of the law.*" The Court then follows with a citation from 5th and 21st Wall., and adopted the doctrine therein announced.



Counsel for the Government in the court below cited 16th Attorney General Opinions, pages 572 to 576, as sustaining the position that legislative authority is necessary. But there is nothing in this opinion that holds that doctrine. The opinion is an answer by the Attorney General to the Secretary of the Interior in regard to the Atlantic & Pacific Railroad grant. The company applied for the appointment of commissioners to examine twenty-five miles of road which was built after the time for completion—July 4, 1878—had expired. It was suggested that, inasmuch as the time for completion of the road had expired, that there was a breach of condition and the grant, so to speak, forfeited itself. It was in answer to this suggestion that the Attorney General wrote his letter, in which he says: "It (the company) having then a present grant, even if it be one liable to forfeiture, it still has a right to proceed to construct the road. *Until in some form* advantage shall be taken of the breach of conditions, it would be the duty of the executive to give it the benefit of the grant." This merely announces a rule that no one has ever questioned—that is, that no one but the grantor can take advantage of a breach of condition and ask for forfeiture and not even then until "*in some form,*" as the opinion states it, the grantor manifests its desire to have the grant forfeited. The grant remains unaffected by the fact that it *may* sometime be forfeited.

In Minneapolis & St. C. R. Co. vs. Duluth & W. R. Co., 47 Northwestern, page 465 (Supreme Court of Minnesota), there was a contest over a forty-acre tract of swamp land claimed by three different sets of claimants, each claiming under the legislative acts of the State of Minnesota. The Court, in disposing of these, said:

“By reference to the Act of March 9, 1875, it will be seen that the grant to the intervenor is what is familiarly known as a grant ‘*in praesenti* upon conditions subsequent.’ It is elementary law that such a grant is not forfeited by mere default of the grantee in the conditions, but only by some affirmative act of the state, after the breach or default, declaring or asserting the forfeiture. *The right of the state to a forfeiture must be asserted by judicial proceedings*, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging a restoration of the estate on that ground; *or there must be some legislative assertion of ownership of the property* for the breach of the condition; and until this is done the grant remains vested in the grantee, notwithstanding the breach of the condition. Moreover, if, after the breach, the grantee proceeds and earns the grant by the construction of its road, before any action on part of the state asserting or declaring a forfeiture, the state cannot afterwards divest the grantee of the land by declaring a forfeiture. These propositions, as applied to land grants, have become so familiar, especially since the decision in *Schulenberg vs. Har-*

riman, 21 Wall. 44, that a discussion of them, or a citation of authorities in their support, would be worse than useless."

In *United States against Holmes*, 105 Fed. 41-43, the Supreme Court said:

"There seems to me no room for reasonable controversy but that the Government of the United States, for the protection of its property is entitled, *without express legislative authority*, to the civil methods ordinarily administered in its courts."

In addition we ask the Court's attention to the case of *United States vs. Whitney*, 176 Federal, page 593, which is directly in point and decisive. In that case a suit was brought to enforce a forfeiture of title to a reservoir site located on public land on account of an alleged breach by the grantee of a condition subsequent embraced in the original grant. There was no legislative action directing the bringing of a suit by the Attorney General. The Court held that there was a condition subsequent and a breach which brings the case exactly on all fours with the situation claimed by the Government to exist in this case. The Government there was insisting that it had the right to proceed without congressional direction. The defendant controverted this claim. Judge Dietrich, in his opinion, says:

"In the present case there has been no congressional action looking to an enforcement of the forfeiture and the only expression of the legislative will is to be found in the provision already quoted

from the original grant. The precise question submitted for decision therefore is: Was it competent for the Attorney General to institute this proceeding, and is this Court authorized to enforce the forfeiture by finding the breach and decreeing a restoration of the estate? Maintaining that the executive department is powerless to institute such a proceeding until Congress shall have expressly conferred special authority therefor, the defendant attaches great significance to the fact that in referring to judicial declarations of forfeiture the Supreme Court in the cases above cited almost invariably speaks of such actions not merely as judicial proceedings, but as judicial proceedings authorized by law, or instituted under authority of law."

The Court then discusses the different cases cited by counsel and further on in the opinion, pages 598 and 599, it says:

"The defendant has especially urged for consideration Senate Resolution No. 48, approved April 30, 1908 (35 Stat. 571), the resolution under which the present suit was brought, which, together with the circumstances surrounding its adoption, it is contended, implies a legislative assertion and an administrative concession of the claim that the executive is without authority to proceed until Congress shall have first expressly and specially conferred such authority; but the history of this resolution does not warrant such a conclusion. From the proceedings it is clear that there existed in the department of



justice a difference of opinion as to the right to proceed without further legislative authority, and that the question was not entirely free from doubt. Apparently the attitude of the Attorney General was that, while he was personally of the opinion that he already had the right to proceed, there was room for question, and before entering upon expensive litigation, involving vast property interests, it was thought discreet to take the precaution of procuring express authority, and thus effectually and finally setting all doubts at rest. It was in this spirit, as I read the record, that the resolution was asked and granted. Moreover, the acts to which the resolution was directed were of a special nature, and were much less definite in their terms than the one now under consideration. It is possible that a distinction should be drawn between a specific grant by special act to a designated person for a prescribed purpose, and grants affected by compliance with the provisions of general and permanent law. A grant being by special act, it may be argued that authority for its revocation should also be conferred by special act. *But, however that may be*, what substantial reason can be adduced for holding that the resolution referred to conferred greater power upon the Attorney General than is possessed by the executive department under the Act of March 3, 1891, and the constitution and general laws? That resolution does not purport to enlarge the jurisdiction of the courts, or vest in them any additional or peculiar power, nor does it create or provide for

any new or special proceeding. It simply authorizes and directs the Attorney General by appropriate actions in the courts to assert such rights as the United States has in certain vast tracts of land included in the original grants. The Act of March 3, 1891, is general and permanent in its character, and operates continuously to convey the title to public lands to all persons complying with its provisions. It cannot be doubted that the forfeiture clause equally with the granting clause is also in the nature of general law and of a permanent character, and that being true, it is not clear why it should not be held to be ample warrant to the Attorney General to enter the courts and there seek the enforcement of public rights and the restoration of the title to public property, thus 'executing the law.' By the Constitution it is made the duty of the chief executive to 'take care that the laws be faithfully executed'; and, if certain rights are granted by general law, and by the same general law it is provided that such rights shall be forfeited on the breach of certain conditions, the breach existing, it is thought that the executive has the authority to institute proceedings in the courts to have such forfeiture judicially declared, and that suits brought for that purpose are judicial proceedings authorized by law."

# A COURT OF EQUITY IS NOT CONTROLLED BY A TECHNICAL RULE OF FORFEITURE FOR BREACH OF CONDITION.

Conceding, as stated in the opening of this brief, equitable jurisdiction, it follows that this being a suit in equity must be governed by the rules of equity procedure. Under the resolution of April 30, 1908, the United States might have proceeded on the law side of the Court. It did not choose to do so. Having appealed to equity it must *do* equity. Whether the proviso in this case created a condition or not, a failure to observe its requirements does not in itself forfeit the grant, or entitle complainant to any relief except as the same may be *equitable*. The breach of the condition or covenant may be waived by the grantor and no one shall be permitted to complain because of the waiver. But when the grantor demands a forfeiture for breach of condition and voices this demand in a court of equity, the court will treat the demand as all demands are treated by the chancellor. The relief sought will be granted only as it is equitable and because it is equitable. Many authorities hold that equity will *never* decree a forfeiture in any case. But waiving that, the court will give only such relief *as is equitable* under the circumstances of the individual case without reference to the question of forfeiture.

Brent against Washington Bank, 10th Peters  
596.

United States against Arredondo, 6th Peters  
691.

In United States vs. Arredondo there was involved a consideration of a Spanish grant made to Arredondo December 22, 1817, 289,745 acres in Florida. Florida was acquired by treaty February 22, 1819. The condition of the grant was "to establish on the land 200 Spanish families, and to begin the establishment within three years" from the date of the grant.

The United States began suit in 1828 in the Superior Court, District of Florida, under the Act of May 23, 1828, to settle private land claims in Florida.

The Court held this to be a condition subsequent and held further:

First. That settlement was commenced within three years. (Page 745.)

Second. No time was fixed for completion of the establishment.

Third. The condition of settlement of 200 families was not complied with in fact (page 745), and added:

"Though a court of law must decide according to the legal construction of the condition, and call on the party for a strict performance, yet a court of equity acting on more liberal principles will soften the rigor of law, and though the party cannot show a legal compliance with the condition if he can do it *cypres*, they will protect and save him from the forfeiture. (Page 745.)

*"The proceeding is in equity according to its established rule; our decree must be in conformity*



*with the principles of justice, which would in such a case as this not only forbid a decree of forfeiture, but impel us to give a final decree in favor of the title conferred by the grant.* (Page 746.)

“We now come to consider the *conditions* upon which the grants were made. According to the rules and the law by which we are directed to decide this case, there can be no doubt that they are subsequent; the grant is in full property in fee, an interest vested on its execution which could only be divested by the breach or non-performance of the conditions which were, that the grantees should establish on the land two hundred Spanish families, together with the requisites pointed out, and which shall be pointed out by the superintendency, and begin the establishment within three years from the date of the grant.”

Let us put this case in the same class with the Arredondo case. Let us admit that the proviso limiting the sales created a “condition subsequent” and that there has been breach—or that it is an enforceable covenant. What then? Forfeiture? Not necessarily. *“Our decree must be in conformity with the principles of justice,”* says the Supreme Court. What principles of justice would sustain the taking of this land from the defendant under the circumstances shown by the testimony now before the Court?

We ask the Court’s consideration of the testimony of C. G. Hockett, secretary of the Southern

Oregon Company, found on pages 285 and 293, printed Abstract. In answer to a demand made by the Government for a report of receipts and expenses of the Southern Oregon Company connected with this grant, Mr. Hockett prepared from the books a complete statement. We quote as follows from pages 292 and 293, printed Abstract:

“Q. Now, have you made an addition and summary of the difference between the receipts of the company during the existence of the Southern Oregon Company and going back to 1884, or whatever company it may be, and the expenditures?

A. The actual expenditures or the evidence of indebtedness?

Q. Whatever you have there.

A. \$691,696.52 that we have paid out more than we have received.

Q. Just give the whole amount you have received first and the whole amount you have paid out. The whole amount you have received from all sources.

A. We received \$124,281.92 in the items given here.

Q. And you have paid out, not including this interest, how much?

A. Paid out not including the interest?

Q. Have you paid out not including the interest?

A. \$597,148.95.

Q. And the difference then between what you have received and what you paid out is how much?

A. \$472,867.03.

Q. That is the excess of the expenditures over receipts, is it?

A. Yes, sir, of actual expenditures and receipts. In addition to that there is \$218,829.49 of interest, \$218,829.49. to be added.

Q. Does that include, Mr. Hockett, the original cost of the land?

A. No, sir, it doesn't. I didn't include that for the reason that up to that time I hadn't received anything."

It appears from other testimony in the case that the properties cost the Southern Oregon Company about \$120,000.00 originally on the 23d of June, 1887. We submit, therefore, that, even conceding the correctness of the Government's claim that this is a case of "condition subsequent" and breach, that a court of equity, even if it decreed a forfeiture, would impress upon the property as a prior lien this \$120,000.00 with interest from June 23, 1827, and the further sum of \$691,696.52 shown by the testimony of Hockett to be the amount which the grant has cost the company over and above the receipts. If this would be the decree in case of condition and breach, it necessarily follows that the same principle would govern in case of covenant and its enforcement.

THE GRANT TO THE STATE OF OREGON WAS  
A GRANT *IN PRAESENTI*—NO LIMITA-  
TIONS COULD BE PLACED UPON THE PER-  
FECTED TITLE—COMPLIANCE WITH THE  
PROVISO A MATTER OF GOOD FAITH  
ONLY BETWEEN THE GOVERNMENT AND  
THE STATE

The grant to the State of Oregon constituted a contract between the United States and the State of Oregon. Upon performance by the State (by its assignee, Coos Bay Wagon Road Company) of its part of the contract by construction of the road, the title vested absolutely in the State of Oregon. The right to deal with its lands and regulate its local affairs according to a policy to be determined by itself is an attribute of the State's sovereignty and the general government has no constitutional right, after title of land passes to the State, to regulate or control the manner in which the State shall manage its affairs or deal with its own property.

In *Camp vs. Smith*, 2 Minnesota, 131-144, there was presented to the Court the question of whether or not a pre-emptor under the Act of Congress of September 4, 1841, might, after purchase or entry and before his patent issues, grant the land or his interests therein. Section 12 of the Act of Congress of September 4, 1841, reads as follows:



“And be it further enacted: that, prior to any entry being made under and by virtue of the provisions of this Act, proof of the settlement and improvement thereby required, shall be made, to the satisfaction of the register and receiver of the land district in which such lands may be, agreeably to such rules as shall be prescribed by the Secretary of the Treasury, who shall each be entitled to receive fifty cents from each applicant for his services to be rendered as aforesaid; *and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void.*”

The facts were that on April 28, 1855, one Anson Northrup purchased and entered, as a pre-emptor, certain Government land and that a patent was issued to him on the 17th day of July, 1855. That on the day of the purchase, but after the entry was perfected, the said Northrup and his wife executed a general warranty deed for the land to Atwater, and after patent had issued Northrup and wife executed and delivered another deed to Atwater under date of October 26, 1855, quit-claiming all rights, etc., to the property. As section 12 *supra* forbade the transfer it was claimed that Atwater got no title. The suit was apparently one to quiet title and the complaint was demurred to. Demurrer was overruled and judgment entered for plaintiff, who was claiming under Atwater. The Court in stating the point at issue said: “The grounds of demurrer, as urged in the argument, are, in substance, that Northrup had no

title to the land entered, before the patent issued; that the first deed to Atwater was, therefore, void; that Atwater, having no interest, no estate passed from him to his assignees; and that no estate passed to, or vested in, the grantees of Atwater, by virtue of the deed made by Northrup and wife after the issuing of the patent, because the deed was made in confirmation of Atwater's interest or estate, which was void in law."

After a very full discussion of the authorities and the principles involved, the Supreme Court of Minnesota, Chief Justice Emmett writing the opinion, said: "*The state can never concede to Congress the right to prescribe to the actual purchaser of public lands within their limits, the mode, manner or time in which he shall enjoy the land purchased. The Federal Government may regulate the terms on which it will give land to the citizen, fix the price for which it shall be sold, and give preference to certain purchasers, but when the terms of the gift are complied with, or the purchase money paid, the gift or purchase is complete; Congress has then exhausted the power over the public lands reserved by the Constitution of the United States, and the sovereignty of the state immediately attaches. As well might Congress entail the public lands, or regulate the law of their descent and alienation in terms, as to prohibit the purchaser from selling until he has received the patent, and then delay the issuing of the patent at pleasure. We do not think that Con-*

gress so intended to legislate, and even if the Act of September 4, 1841, had in plain terms prohibited the transfer of the lands instead of the mere right of pre-emption, until after the patent has issued, we are not yet prepared to regard such a prohibition as binding.

“The United States has but a proprietary interest in the public lands within the several states; the sovereignty is in the states. The rights attaching to the interest do not differ from those of any other landholder in the state, except as provided by the Constitution of the United States and the terms of the compact between the general and state governments at the time the state is admitted into the Union. The Constitution merely asserts the right to dispose of, as proprietor, and to make needful rules and regulations necessary to the exercise of that right. But the right to dispose of does not include the right to limit the enjoyment after sale nor to prescribe how or when the purchaser shall dispose of his land; and the right to make needful rules and regulations is such only as may be exercised by every proprietor.”

In this connection we ask the Court's consideration of the case of Dunklin County v. the District County Court of Dunklin County, 23 Missouri Reports, pages 449-456. This was an application for a mandamus to be directed to the District County Court to show why a former order directing the sale of certain swamp and overflowed lands to the Cairo

& Fulton Railway Company, in payment of the subscription of capital stock of said company, should not be vacated. The case went off, of course, upon refusal of the Court to grant the mandamus because it was not the proper remedy, but Judge Leonard, in deciding the case, met squarely the proposition relied upon by the defendant—that the county had the right to sell the swamp lands for the purposes indicated, notwithstanding that the Act of Congress, September 28, 1850, granting the lands to the State of Arkansas, contained a provision that the proceeds of said lands shall be applied exclusively to the purpose of reclaiming said lands by the means of levees and drainage. The petitioner claimed:

“The Act of Congress is not simply a grant coupled with a trust addressed to the conscience of the grantee. It is a grant with legislative provisions as to the disposition of the thing granted.”

Answering this contention, the Supreme Court of Missouri says:

“By the Act of Congress of 28th September, 1850 (9 U. S. Stats. 519), the terms of the grant to the State of Arkansas are, ‘to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein,’ and, by a subsequent section of the same Act, it is declared that the provisions of the Act are extended to every other state in which such lands may be found. The original grant, made by the state to the counties, was in order to execute this trust, and it is



supposed that the trust is fastened upon the lands, so that they cannot be disposed of by the state for any other purpose. *This, however, is not correct; the trust reposed by the United States is in the State of Missouri; it is a personal trust in the public faith of the state, and not a property trust, fastened by the terms of the grant upon the land itself, and following it into whose hands soever it may pass.* It is proper, however, here to remark, in vindication of the state, that the original grant by the United States contemplates, of course, a sale of the land, in order to render it available for the purposes of the trust, and it is not to be supposed that this state will be guilty of a breach of her good faith by applying the stock for which the land is sold to any other purpose, without the consent of the United States. *But however that may be, it is a matter exclusively within the control of the Legislature."*

In *Seymour v. Sanders*, 3 Dillon, 437, 440, Judge Dillon says:

"Thus the plenary power of Congress over the disposition of the public lands within the state is expressly recognized to exist by the organic law of the state; and we hold that Congress may dispose of them at such time, in such manner, and for such purposes as in its judgment it may deem best.

"The title to all public lands must pass and vest according to the laws of the United States (*Wilcox v. Jackson*, 13 Pet. 498, 517). And, undoubtedly, it is true as a general proposition, that after the title

has passed from the United States, and is fully vested in purchasers from it, the land becomes subject to state legislation, and the power of the general government with respect to it ceases, except so far as it is otherwise lawfully provided in the Act by which Congress disposes of the land."

In *Wilcox vs. McConnel*, 13 Pet. 498, 516, Mr. Justice Barbour, announcing the unanimous opinion of the Court, says :

"We hold the true principle to be this, that whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

This is a grant *in presenti*. When the road was completed and accepted, the grant took effect, as of April 3, 1869, the date of the Act. The complete title passed to the State of Oregon; the issuance of the patents had nothing to do with the passing of the title. Not an acre of this land was sold by the Coos Bay Wagon Road Company until the road was completed and accepted. When the title therefore vested in the State of Oregon, its future disposal, in the language of Mr. Justice Barbour, in *Wilcox v. Mc-*

Connel, *supra*: “*Like all other property in the state, is subject to the state legislation.*” In the Mills County case, 107 U. S., and Hager v. Reclamation District, 111 U. S. *supra*, the same doctrine is held, applied, however, to a different situation. In those cases, the controversy was over the disposition of the funds arising from the sale of swamp lands. The Supreme Court held in both cases that the state, having sold the land, the Government had no authority to follow the proceeds, although the grant was made upon condition that the proceeds should be used for a specific purpose. Counsel suggests a distinction between those cases and the one at bar, because the Government, in the swamp land cases, confessedly had a right to sell the lands and the dispute was about the application of the proceeds. But the principle underlying the decision in both the cases cited is exactly the same principle that we are invoking here. Here, as there, the state had a right to sell. In those cases the limitation was upon the *use* of the proceeds; here the limitation concerned the *amount* of the proceeds. The reasons which moved the court in the Mills case and Hager v. Reclamation District were, that the land had passed beyond the control of the Government, and: “*Like all other property in the state is subject to the state legislation.*”

While a President's message is not “authority” in the sense in which that word is used by lawyers in briefs, yet it may contain matter persuasive in

the determination of a law question in court. For this reason we call the Court's attention to the Veto Message of President Buchanan, February 24, 1859, vetoing—

“An Act donating public lands to the several states and territories which may provide colleges for the benefit of agricultural or mechanical arts.”

This message is found in Vol. 5, “Messages and Papers of the Presidents,” on pages 543 to 550. We quote from page 546:

“The Federal Government, which makes the donation, has confessedly no constitutional power to follow it into the states and enforce the application of the fund to the intended objects. As donors we shall possess no control over our own gift after it shall have passed from our hands. It is true that the State Legislatures are required to stipulate that they will faithfully execute the trust in the manner prescribed by the bill. But should they fail to do this, what would be the consequence? The Federal Government has no power, and ought to have no power, to compel the execution of the trust. It would be in as helpless a condition as if, even in this, the time of great need, we were to demand any portion of the many millions of surplus revenue deposited with the states for safe-keeping under the Act of 1836.”

Mills County v. R. R. Co., 107 U. S. 557, 566.

Hagar v. Reclamation District, 111 U. S. 701,  
712.



Emigrant Co. v. County of Adams, 100 U. S. 61, 69.

Cook County v. C. C. Canal etc. Co., 138 U. S. 635, 655.

U. S. v. Des Moines etc. Co., 142 U. S. 510, 541.

McNee v. Donahue, 142 U. S. 587, 602.

Chandler v. C. & H. Min. Co., 36 Fed. 665, 667.

U. S. v. Louisiana, 127 U. S. 182, 187.

## CONCLUSION.

This is defendant's case, and it remains but to consider some general statements in the bill and claims made by the Government in the court below, and which will likely be made here, and answer them.

### ALLEGATIONS OF FRAUD DISPROVED BY THE TESTIMONY.

The complaint in this suit was drawn because of false information of some kind communicated to the Assistant Attorney General who prepared it. One of the principal allegations in support of the plea for forfeiture is found on page 19 of the bill and is as follows:

“The alleged indebtedness secured by said mortgages was fictitious, feigned and untrue, and represented simply the interest of the stockholders, or certain thereof, of said Oregon Southern Improvement Company. Said mortgages executed and delivered to said Boston Safe Deposit and Trust Company as aforesaid were executed, delivered and foreclosed and caused to be executed, delivered and foreclosed

by the officers, stockholders and owners of said Oregon Southern Improvement Company with the intent and in the hope that by the aforesaid foreclosure sale the aforesaid restrictions upon the sale and disposition of said granted lands established by the terms of said Act of Congress approved March 3, A. D. 1869, might be evaded and defeated, and that the rights of your orator in the premises might be hindered, impaired and destroyed, and that the aforesaid conditional estate created by said Act of Congress approved March 3, A. D. 1869, might be converted into an unconditional estate for the use and benefit of the said officers, stockholders and owners of said Oregon Southern Improvement Company."

This did well enough to put in the bill, but in the taking of testimony the Government totally abandoned it, and the defendant has established its falsity beyond any question or doubt. Every witness (Crapo, Rotch, Yoakam, Shine) who had any knowledge on the subject testifies that the allegation is unfounded and that the mortgage was given in good faith and for an honest debt, and the foreclosure was also in good faith. And every letter, account, memorandum and statement, by whomsoever written or made during the years when this Oregon Southern Improvement Company was trying to weather the financial storm, shows that the company was insolvent and the mortgage was genuine and the foreclosure honest.

## SECTION VI OF THE ACT.

It was claimed on the trial that, "The granting act imposed upon the State the duty of selling the land. If it had not been for Section 6 there would have been no authority to make the transfer to the Wagon Road Company, but this authority was not extended by the section or otherwise."

We are unable to understand what this means or can mean. Section 6 gives no authority to do anything. It certainly didn't "impose upon the State" the duty of selling the land. As Judge Bellinger says in *Nichols v. Southern Oregon Co.*, 135 Fed. 234: "The grant was not a law for the sale of the granted lands. It did not offer them for sale." It is a direction to the Surveyor General to survey the lands at as early a period as practicable "after said State shall have enacted the necessary legislation to carry this act into effect." The "necessary legislation" referred to in Section 6 is clearly the legislation suggested in Section 3, that "said road shall be constructed with such width, gradation and bridge as to permit of its regular use as a wagon road and in such other special manner as the State of Oregon may prescribe."

NO NOTICE TO GOVERNMENT OF PRETENDED BREACH OF  
CONDITION PRIOR TO 1908.

It was claimed at the trial that, "The proof fails to show that any notice of the violation was brought, in any form, to the attention of Congress before the introduction of the joint resolution authorizing the

commencement of this suit." We might add to this that the proof does show that the only complaint that was ever made by anybody to Congress, or to any officer of the Government, was made by this defendant through its attorneys, asking the Attorney General *to do something* to clear up defendant's title. At the hearing before the committee, beginning March 12, 1908, Elijah Smith, president of the defendant company, testifies that the controversy over the title had so clouded it that it became necessary for something to be done, and that he requested his attorneys to write the Attorney General, which they did. This letter is in the Government's possession and as far as this testimony shows, and as far as we know, it is the only complaint in any shape that was made to the Government concerning this grant.

On this point we ask the Court's attention to the record of land grant forfeitures by Congress and in the courts. Up to the entry of judgments in this Court, in the O. & C. Case, 186 Federal, *there never was a land grant forfeited except for non-completion of the road in aid of which it was made. Failure to construct* was the only ground that was ever recognized as sufficient to justify a forfeiture. We will not encumber this brief with a list of these cases; they are all set out in an official book printed by authority of Congress and entitled, "Statement showing land grants made by Congress to aid in the construction of railroads, wagon roads, canals and internal improvements, together with the data rela-



tive thereto. Compiled from the records of the General Land Office by the order of the Secretary of the Interior." This book was filed with the Court in the O. & C. case.

### THE DEBATES IN CONGRESS.

Importance seems to be attached to what was said by members of Congress at the time of the passage of the act. These debates settle nothing, as is held by the Supreme Court in many cases. In *United States v. Freight Association*, 166 U. S., pages 318 and 319, the Court said:

"There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. *United States v. Union Pacific Railroad Company*, 91 U. S. 72, 79; *Aldridge v. Williams*, 3 How. 9, 24, Taney, Chief Justice; *Mitchell v. Great Works Milling & Manufacturing Company*, 2 Story, 648, 653; *Queen v. Hertford College*, 3 Q. B. D. 693, 707.

"The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it

was passed. (Cases cited, *supra*.) If such resort be had, we are still unable to see that the railroads were not intended to be included in this legislation."

Even if this were not so, the Congressional debates on this grant do not aid the Government in its present contention. When the bill was first passed by the Senate, this clause we are now considering was not in the bill. When it reached the House, Julian proposed it, and then for some reason changed his mind and said he would amend his amendment. He was granted leave to do so and presumably drafted the amendment as it now appears. The suggestion that perhaps somebody surreptitiously interfered with it is not borne out by the records and there is no foundation whatever to sustain it. Mr. Mallory, on the floor of the House, told Congress that the lands could not be sold for a cent an acre: "A large portion of the land proposed to be granted is not worth anything. Most of it lies on this range of mountains and could not be sold for one cent an acre." And that is why the "actual settler" provision was left out.

#### GOVERNMENT'S POSITION AS TO BONA FIDE PURCHASER.

It is claimed by the Government that however innocent we may be *in fact*, we cannot be held innocent *in law*, because of certain *presumptions* and notice contained in the patents. But this is not sound. As to the recitals in the patents, it may be noted that no reference whatever is made in the patent to

this so-called limitation on the grant. The patents are straight-out patents conveying a complete title. The same is true of the recorded instruments pleaded in the bill, and it is claimed that we are chargeable with a knowledge that no one else ever apparently had.

On November 22, 1880, Judge Deady decided the case of the Coos Bay Wagon Road Co. against Crocker, and it is stipulated that this record may be considered in evidence. It would be so anyway, as the opinion is published in 6 Sawyer, pages 574 to 584. The claim of the Coos Bay Wagon Road Co. was based upon the sale made by that company to Miller and by Miller to Stanford, Huntington and Hopkins, etc., as pleaded in the bill herein, and the suit was to enforce a vendor's lien on account thereof. The Court granted the relief prayed for. If everybody connected with this grant knew in 1875 of this pretended "condition," as counsel wants this Court to understand, it is curious that Judge Deady did not know it as late as 1880. The fact is that nobody knew or pretended to know any such thing. The parties in that suit were represented by able counsel and a large amount of money was involved. Crocker was resisting the payment and was using every means to avoid complying with the contract. It did not occur to him nor to his attorneys, nor to Judge Deady, that this contract was in violation of law and could not be enforced. And during all the time that elapsed since the decision in 6 Sawyer to the decision in 135 Federal, *Nichols v. S. O. Co.*, neither the Government nor anyone else pretended that there

was any limitation in the grant affecting title to these lands, *after completion of the road and acceptance by the State.*

#### “POLICY” OF THE GOVERNMENT.

Notwithstanding that the grant involved here does not contain any provision for “actual settlers” or “actual settlement,” it was claimed in the lower Court and will be here that there is some “fixed policy” of Congress with reference to land grants. But this is not controlling and cannot be, even if there *were* any well-defined policy moving to the accomplishment of a certain result. In the case of *Haddon v. the Collector*, 5th Wall. 107, 111, Mr. Justice Field, announcing the opinion in Court, said: “What is termed the ‘policy of the Government’ with reference to any particular legislation is generally a very uncertain thing upon which all sorts of opinions, however varying from the other, may be formed by different persons. *It is a ground much too unstable upon which to rest the judgment of the Court in the interpretation of statutes.*”

But outside of this, there is no such policy. Nearly all the lands in Oregon contiguous to the territory involved in this suit, which were taken up in the last twenty-five years, were taken under the Timber and Stone Act, and that act does not provide for settlement. The School Section Act of Congress does not provide for settlement; neither the Swamp Land Act, or Salt Marsh, or Tide-Land Acts; neither the act for interior improvements nor the Agricultural



College Act provide for settlement. The other wagon road grants, Dalles Military, Willamette Valley and Cascade Mountain, Oregon Central Military (all Oregon roads) do not provide for settlement. This suit was not brought because of that "policy" or any "policy." It is, as everybody in this territory knows, but the aftermath of the "land fraud trials." About the year 1902 there was inaugurated an investigation of the method by which the public lands in Oregon had been disposed of *under the Timber and Stone Act and the Homestead Law*. The investigation had nothing to do with this grant. As a result of this and the subsequent disclosures with their consequences, the public mind in Oregon became inflamed upon the subject of land tenures and land grants. And the legislature of 1907, following in the wake of all this clamor and disturbance, memorialized Congress—*not to forfeit this grant* nor any grant,—but "to enact such laws and take such steps, by resolution or otherwise, as may be necessary to compel said railroad company (O. & C. R. R. Co.) to comply with the conditions of said grant." (Session Laws, Oregon, p. 517.) This memorial referred to the *Oregon & California grant only*.

It did not enter into the mind of anyone that *this* grant was to be forfeited. Nobody wanted it forfeited. The only people interested in the resolution of Congress or in obtaining the relief that the resolution called for were, first, misguided individuals who thought *they* would get the lands at \$2.50 per

acre. Second, large timber holders who were not misguided, but who hoped that the result would be to tie up these lands in forest reservations so that nobody could get them and they, the timber holders, would eventually be the beneficiaries of the legislation, because they were the only ones who could buy the timber. Although this matter was fully investigated by a committee of Congress, who took a year in the examination, Congress refused to declare a forfeiture of these lands or any of them, or even of the railroad lands, and so expressly declared in the resolution under which this suit is brought. If Congress, after all this investigation, refused to declare the forfeiture, it is reasonable to presume that they thought they had no right to do it. And why should it be done at all here, or anywhere? What call is there now to set in motion the machinery of a Court of Equity to cancel this grant and deprive the defendant of the property which it bought in good faith, relying upon similar good faith on the part of the Government? Forty-seven years have elapsed since this grant was made. The road was built in strict accordance with the terms of the grant. It was accepted by the Government. Every acre of this land was earned and honestly earned. Patents were issued by the Government after full knowledge that the State had transferred the grant to the Coos Bay Wagon Road Company. As early as 1880 the whole matter was litigated in this Court in the case of *Crocker v. Coos Bay Wagon Road Co.*, 6 Saw. page 574. Nobody up to that time ever pretended that

there was any flaw in the title, or limitation upon the right of the Coos Bay Wagon Road to sell these lands. The four suits, Defendant's Exhibits 240, 241, 242, 243, were brought by the Government to cancel different portions of the grant. The defendants informed the Government of their rights and pleaded in one of the suits every single fact pleaded in this suit. This was in 1896. Subsequently Nichols, representing a syndicate of speculators, brought his suit against this defendant and his complaint was dismissed and the reasons are set out by Judge Belinger, 135 Federal, page 233. In the administration of this property—in providing for its up-keep and fixed and overhead charges, the defendant has expended of its own money \$691,696.52 more than it has received, and this not taking into consideration the original cost when it was purchased in 1888—in the neighborhood of \$100,000. It is no longer a question of splitting hairs over a technicality, as to whether the proviso in the grant creates a "condition" or is merely a "covenant." It is a question of common honesty between man and man. Government should not be permitted to do a thing which, if done by a private individual, would bring down upon him the contempt of his fellows and the condemnation of every decent, right-thinking man. Judge Gilbert voiced this thought in different language but with equal force when he said in 54 Federal, 811: *"But when matter of estoppel arises the observances of honest dealing may become of higher*

*importance than the preservation of the public domain."*

And why all this contention over what was done, or was not done, by the Oregon Southern Improvement Company, or this defendant? This is not a condition or covenant "running with the land." If the Government has any case here it is because of what the Coos Bay Wagon Road Company did or did not do. If the Coos Bay Wagon Road Company had a right to sell, as it did sell, the Government has no case. If it had no right to make the sales it did make, and if the sale to Miller was a breach of condition or violation of a covenant, the Government's right to proceed arises out of that sale and not out of anything that was done thereafter.

The whole claim that the present litigation about this grant is in the interest of "settlers" or "actual settlers" or to promote "settlement of the land" is the merest pretense—and is unworthy of the Government. The Government itself hasn't followed any such pretended "policy," as clearly appears from the provisions of the Timber and Stone Act. It does not intend to follow any such "policy" now, with reference to these lands, if it gets them. They are the same character of lands as the O. & C. lands. The O. & C. grant, in fact, lies right across these lands, as shown in the record of the case, Exhibit 242, *supra*. What "policy" of settlement does the Government intend to follow in regard to these railroad lands? On August 20, 1912, Congress passed the Act commonly called the "Innocent Purchasers' Act."



Section 2 of that Act reads as follows: "That none of the lands reverted to the United States by virtue of any right to forfeiture thereto as aforesaid shall be or become *subject to entry under any of the public-land laws of the United States, or to the initiation of any right whatever under any of the public-land laws of the United States.*"

What sham this all is. The Government is complaining here that we did not sell the land—that we "*retarded the development of the country,*" as they put it. Well, we did sell some land. We sold what we could sell. We did not sell any more because we could not sell—nobody would buy and we could not *make* them buy. What remedy is proposed by the Government to stop us from further "*retarding the development of the country*"? Why, since nobody would buy heretofore, when they *might*—hereafter *they shall not be permitted to buy at all*—even if they want to. And the decree in this case is in accordance with that suggestion.

This suit should be dismissed. There is no equity in the bill. It is based upon a false notion as to the facts. The Attorney General or whoever drafted it entertained the erroneous opinion that there was initial fraud in the execution of the mortgage to the Boston Safe Deposit & Trust Co. and in its foreclosure. This claim is practically abandoned on the trial, and the testimony shows it has no merit. No other charge of fraud or suggestion of fraud is made in the bill or the proof. No reason whatever is given by the Government for asking that the title to these

lands be forfeited, except the naked syllogism:

a. Where a grant is upon condition subsequent and there has been a breach, it *may be* forfeited.

b. This is a grant upon condition subsequent and there has been a breach.

c. Therefore this grant *must* be forfeited.

The *non sequitur* in this "argument" is apparent; the error is fundamental and pervades the Government's entire case.

This suit is not on the law side of the Court, where hard and fast rules of procedure sometimes fetter the conscience and obstruct instead of aid in the administration of justice. We are in a higher forum—a Court of conscience where the answer to but one question will shape the Court's ultimate decision: "*Is this demand honest?*"

"A Court of Equity can act only on the conscience of a party. If he has done nothing that taints it no demand can attach upon it so as to give any jurisdiction." (Sug. Vend.)

Respectfully submitted,

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*Solicitors for Defendant.*

TABLE OF CASES—*Continued*

## U.

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- United States v. Budd, 144 U. S. 154, 166.
- United States v. Budd, 43 Federal, 630.
- United States v. California & Oregon Land Co., 148 U. S. 40 and 41.
- United States v. California & Oregon Land Co., 192 U. S. 355.
- United States v. Chandler-Dunbar Water Power Co., 152 Fed. 40.
- United States v. Clark, 294 Fed. 299.
- United States v. Denver & Rio Grande R. R. Co., 150 U. S. 14.
- United States v. Des Moines, etc., Co., 142 U. S. 510, 541.
- United States v. Detroit Timber Co., 131 Federal, 677, 678.
- United States v. Detroit Timber Co., 200 U. S. 321.
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- United States v. Freight Ass'n., 166 U. S., pp. 318 and 319.
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- United States v. Louisiana, 127 U. S. 182, 187.
- United States v. M. K. T. Ry. Co., 37 Fed. 68, 70.
- United States v. McLaughlin, 30 Fed. 147, 161.
- United States v. New York Indians, 170 U. S., p. 60.
- United States v. Northern Pacific Ry. Co., 95 Fed. 864, 880.

TABLE OF CASES—*Continued*

United States v. Northern Pacific Ry. Co., 177 U. S. 435.

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## V.

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## W.

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Wilcox v. McConnel, 13 Peters, 496, 516.

Wilcox v. Jackson, 13 Peters, 498, 517.







